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No. 94 - _____

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

Martin Light; Diane Light; Lauren Light, a minor by and through Martin and Diane Light, her next friends,

Petitioners,

v.

Parkway C-2 School District; and Special School District of St. Louis County

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

I

Whether the Eighth Circuit misread and misapplied **Honig v. Doe**, 44 U.S. 305, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988). Did the Eighth Circuit err by allowing Lauren Light to be removed from public school by judicial fiat, not because she was "truly dangerous," but simply because she was "substantially likely to cause injury to herself or another," even though she cannot form the intent to "injure" anyone.

II

Whether the Eighth Circuit acted as a roving commission by refusing to set down standards and objective measures by which to determine whether Lauren Light was truly dangerous and substantially likely to cause injury to herself or another; and, whether the Circuit Court erred by refusing to define the words "substantially," "injury," or "dangerous."

III

Did the Eighth Circuit err by refusing to consider whether Lauren Light was deprived of due process because the district court denied her request to present dramatic and relevant new evidence that was unknown to her until after the hearing on the TRO before the district court.

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I. The Eighth Circuit misinterpreted and misapplied this Court's decision in Honig v. Doe, in that it ignored the dictate that a child with disabilities may only be removed from a public school by judicial fiat if that child is first found to be "truly dangerous." The Eighth Circuit and the district court chose to ignore that standard; instead, both lower courts chose to utilize the vague and ill-defined phrase "substantially likely to injure herself or others," upon which to justify the immediate removal of Lauren from public school.

II. Both the district court and the Eighth Circuit acted as roving commissions. Neither court defined the terms they used. There is no definition of "injury," and the word used by this court in Honig, "dangerous," is ignored. Both courts refused to consider intent as a measure by which to determine injury. Neither court attempted to define an objective standard by which to differentiate between

nuisance behavior and that which causes a child to be "dangerous," and "intentionally" inflict an "injury."

III. The United States District Court erred when it denied the request of the Lights "to reopen the hearing." During the 3 days of hearing, the school districts presented much evidence in regard to where Lauren was to go to school and why Lauren was incapable of being educated at Parkway. The day before the District Court was to rule, the undersigned learned of extraordinary new evidence indicating that some teachers employed by the Special School District felt that Lauren could be educated at Parkway. In a letter to the court, the undersigned stated the names of those potential witnesses and the subject of their anticipated testimony.

Although the Lights raised this issue on appeal to the Eighth Circuit, and it was discussed during oral argument, no mention has been made of it in the Eighth Circuit opinion. Yet, the thrust of the testimony that was improperly foreclosed to the Lights had the likelihood of being decisive in the decision.

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Opinions Below

A three day hearing was held before the United States District Court, Eastern District of Missouri, Eastern Division, the Honorable George F. Gunn, Jr. presiding. On April 22, 1994, the day after the hearing was concluded, Judge Gunn issued an Order in which he granted the injunctive relief sought by the school districts and removed Lauren from Parkway Central Middle School. (App. at 1).

Four days later, on April 26, 1994, the District Court issued its Judgment in the matter which amplified upon its Order. (App. at 4). The Judgment made the issuance of the injunction permanent for purposes of appeal. (App.at 9).

The Lights took an appeal to the Eighth Circuit.

The Eighth Circuit issued its opinion on December 2, 1994, and affirmed the decision of the District Court to remove immediately Lauren from the Parkway Central Middle School. **Light v. Parkway Central Middle School**, 41 F.3d 1223 (8th Cir. 1994); and, Appendix at 10. On January 11, 1995, the Eighth Circuit denied the petition for rehearing filed by the Lights. (App. at 38).

Jurisdictional Statement

The Judgment of a panel for the United States Court of Appeals for the Eighth Circuit was entered on December 20, 1994. The Judgment was the subject of a Motion for Rehearing, with a Suggestion that the case be reheard en banc. Both Motions were denied on January 11, 1995. Petitioners Lauren Light and her parents invoke this Court's jurisdiction under 28 USC § 1254.

Constitutional Provisions and Statutes Involved

Due Process Clause, Fifth Amendment, U.S. Constitution:

* * * nor be deprived of life, liberty or property without due process of law * * *.

20 U.S.C. § 1415:

(a) Establishment and maintenance

Any State educational agency, any local educational agency, and any intermediate educational unit which receives assistance under this subchapter shall establish and maintain procedures in accordance with subsection (b) through subsection (e) of this section to assure that children with disabilities and their parents or guardians are guaranteed procedural safeguards with respect to the provision of free appropriate public education by such agencies and units.

(b) Required procedures; hearing

(1) The procedures required by this section shall include, but shall not be limited to--

(A) an opportunity for the parents or guardian of a child with a disability to examine all relevant records with respect to the identification, evaluation, and educational placement of the child, and the provision of a free appropriate public education to such child, and to obtain an independent educational evaluation of the child;

(B) procedures to protect the rights of the child whenever the parents or guardian of the child are not known, unavailable, or the child is a ward of the State, including the assignment of an individual (who shall not be an employee of the

State educational agency, local educational agency, or intermediate educational unit involved in the education or care of the child) to act as a surrogate for the parents or guardian;

(C) written prior notice to the parents or guardian of the child whenever such agency or unit--

(i) proposes to initiate or change, or

(ii) refuses to initiate or change,

the identification, evaluation, or educational placement of the child or the provision of a free appropriate public education to the child;

(D) procedures designed to assure that the notice required by clause (C) fully informs the parents or guardian, in the parents' or guardian's native language, unless it clearly is not feasible to do so, of all procedures available pursuant to this section; and

(E) an opportunity to present complaints with respect to any matter relating to the identification, evaluation, or educational placement of the child, or the provision of a free appropriate public education to such child.

(2) Whenever a complaint has been received under paragraph (1) of this subsection, the parents or guardian shall have an opportunity for an impartial due process hearing which shall be conducted by the State educational agency or by the local educational agency or intermediate educational unit, as determined by State law or by the State educational agency. No hearing conducted pursuant to the requirements of this paragraph shall be conducted by an employee of such agency or unit involved in the education or care of the child.

(c) Review of local decision by State educational agency

If the hearing required in paragraph (2) of subsection (b) of this section is conducted by a local educational agency or an intermediate educational unit, any party aggrieved by the findings and decision rendered in such a hearing may appeal to the State educational agency which shall conduct an impartial review of such hearing. The officer conducting such review shall make an independent decision upon completion of such review.

(d) Enumeration of rights accorded parties to hearings

Any party to any hearing conducted pursuant to subsections (b) and (c) of this section shall be accorded--

(1) the right to be accompanied and advised by counsel and by individuals with special knowledge or training with respect to the problems of children with disabilities,

(2) the right to present evidence and confront, cross-examine, and compel the attendance of witnesses,

(3) the right to a written or electronic verbatim record of such hearing, and

(4) the right to written findings of fact and decisions (which findings and decisions shall be made available to the public consistent with the requirements of section 1417(c) of this title and shall also be transmitted to the advisory panel established pursuant to section 1413(a)(12) of this title).

(e) Civil action; jurisdiction

(1) A decision made in a hearing conducted pursuant to paragraph (2) of subsection (b) of this section shall be final, except that any party involved in such hearing may appeal such

decision under the provisions of subsection (c) and paragraph (2) of this subsection. A decision made under subsection (c) of this section shall be final, except that any party may bring an action under paragraph (2) of this subsection.

(2) Any party aggrieved by the findings and decision made under subsection (b) of this section who does not have the right to an appeal under subsection (c) of this section, and any party aggrieved by the findings and decision under subsection (c) of this section, shall have the right to bring a civil action with respect to the complaint presented pursuant to this section, which action may be brought in any State court of competent jurisdiction or in a district court of the United States without regard to the amount in controversy. In any action brought under this paragraph the court shall receive the records of the administrative proceedings, shall hear additional evidence at the request of a party, and, basing its decision on the preponderance of the evidence, shall grant such relief as the court determines is appropriate.

(3) During the pendency of any proceedings conducted pursuant to this section, unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child, or, if applying for initial admission to a public school, shall, with the consent of the parents or guardian, be placed in the public school program until all such proceedings have been completed.

(4)(A) The district courts of the United States shall have jurisdiction of actions brought under this subsection without regard to the amount in controversy.

(B) In any action or proceeding brought under this subsection, the court, in its discretion, may award reasonable attorneys' fees as part of the costs to the parents or guardian of a child or youth with a disability who is the prevailing party.

(C) For the purpose of this subsection, fees awarded under this subsection shall be based on rates prevailing in the community in which the action or proceeding arose for the kind and quality of services furnished. No bonus or multiplier may be used in calculating the fees awarded under this subsection.

(D) No award of attorneys' fees and related costs may be made in any action or proceeding under this subsection for services performed subsequent to the time of a written offer of settlement to a parent or guardian, if--

(i) the offer is made within the time prescribed by Rule 68 of the Federal Rules of Civil Procedure or, in the case of an administrative proceeding, at any time more than ten days before the proceeding begins;

(ii) the offer is not accepted within ten days; and

(iii) the court or administrative officer finds that the relief finally obtained by the parents or guardian is not more favorable to the parents or guardian than the offer of settlement.

(E) Notwithstanding the provisions of subparagraph (D), an award of attorneys' fees and related costs may be made to a parent or guardian who is the prevailing party and who was substantially justified in rejecting the settlement offer.

(F) Whenever the court finds that--

(i) the parent or guardian, during the course of the action or proceeding, unreasonably protracted the final resolution of the controversy;

(ii) the amount of the attorneys' fees otherwise authorized to be awarded unreasonably exceeds the hourly rate prevailing in the community for similar services by attorneys of reasonably comparable skill, experience, and reputation; or

(iii) the time spent and legal services furnished were excessive considering the nature of the action or proceeding,

the court shall reduce, accordingly, the amount of the attorneys' fees awarded under this subsection.

(G) The provisions of subparagraph (F) shall not apply in any action or proceeding if the court finds that the State or local educational agency unreasonably protracted the final resolution of the action or proceeding or there was a violation of this section.

(f) Effect on other laws

Nothing in this chapter shall be construed to restrict or limit the rights, procedures, and remedies available under the Constitution, title V of the Rehabilitation Act of 1973 [29 U.S.C.A. Sec. 790 et seq.], or other Federal statutes protecting the rights of children and youth with disabilities, except that before the filing of a civil action under such laws seeking relief that is also available under this subchapter, the procedures under subsections (b)(2) and (c) of this section shall be exhausted to the same extent as would be required had the action been brought under this subchapter.

STATEMENT OF THE CASE

Introduction

Laren Light is 13 years old. She has two younger non-disabled brothers. Aaron is 12 years old and Josh is 11.

Lauren was adopted by her parents, Marty and Diane Light, when she was 8 weeks old. At that time, Lauren did not suffer from a disability. At the age of 7 months, Lauren became sick. At that time, Lauren began to have seizures; and, at 18 months of age, Diane Light, her mother, noticed that Lauren was more active than other children.

Lauren's Educational and Medical History

Lauren was first educated in the Special Education Class at the Neuwoehner School in 1985, when Lauren was 4 or 5 years old. Neuwoehner is a segregated school; the only children in that facility are disabled and have no opportunity to associate with their non-disabled peers. At home, during this time, Lauren would kick, throw things, and the like.

As Lauren grew, her development was delayed in speaking, toilet training and other areas. Lauren has been to many doctors, psychiatrists, and psychologists; axiomatically, she has been tested many times.

Lauren's psychiatrist for the 13 months previous to the hearing before the district court in April 1994, was Dr. Audrey Hill. Dr. Hill specialized in child adolescent psychiatry at St. Louis University Health Sciences Center. Dr. Hill diagnosed Lauren as suffering from "organic brain disorder, not otherwise specified, and also pervasive developmental disorder, not otherwise specified." Pervasive Developmental Disorder is a condition that falls within the autistic spectrum, but is used in cases where patients do not meet the full criteria to be diagnosed

with autism. Lauren's condition is less severe than autism, but there is developmental delay in terms of her ability to engage in reciprocal social interaction. Lauren is unable to read adequately the cues that she receives from other people; she is unaware of when she may be invading the space of another. Lauren is limited in her verbal and nonverbal ability. She has a language disorder. That disorder involves both receptive and expressive language; thus, when she hears someone say something to her, her brain begins to process it, but there is something that occurs with the way her brain works so that she does not get the entire signal. Consequently, Lauren is unable to pull together what she hears and process it so that she can always understand what is said to her.

The result is that Lauren can misinterpret verbal and physical cues. It is difficult to ascertain how much of a message Lauren gets when she is told what is expected of her behavior. Because Lauren may not always get the entire message, it is better to give Lauren simple commands rather than multi-step commands. Lauren responds well to a lot of repetitive drilling.

According to Dr. Hill, although Lauren is not autistic, "she does have some autistic-like features." Lauren does a lot of hand-flicking. Lauren has a fascination with peoples' faces and so she will flick ears and hair. A lot of times, Lauren will poke. When Lauren tries to make contact, usually some type of tactile contact with other people, her flicking behavior and fascination with the faces of others can result in her inadvertently poking another person. But, Lauren would not deliberately try to hurt anyone. Indeed, sometimes Lauren will approach a person to hug them, but because of her disability her mouth will remain open. It appears that Lauren has some sort of sensory deficit where she feels a strong need to stimulate herself orally; thus, she often will approach people with her mouth open. Sometimes, she may end up mouthing clothing; sometimes, she may mouth her own hands. Sometimes, she may go with an open mouth and approach

someone. It may end up being a kiss. The result depends upon how the other person responds. If the other person feels threatened and starts to push Lauren away and exhibits hostile behavior, then Lauren is unable to access what is happening at that moment. Lauren sees the other person defending himself and so Lauren begins to defend herself. With untrained personnel, the situation can deteriorate. When Lauren approaches another person with an open mouth it may be just to give that individual a kiss, but because of the hostile response of the other person, Lauren may end up biting that individual.

Therefore, the person who is around Lauren should be trained in the techniques of redirection. Redirection is a methodology by which a child with disabilities like Lauren's is redirected from poor behavior to better behavior by being given alternatives rather than commands. Lauren does not respond to orders or dictates such as "no, don't do that." Rather, Lauren must be lead by a trained educator to an activity that is positive and away from the activity deemed to be disruptive.

Because Lauren cannot and does not form the intent to harm another individual, it was the opinion of her psychiatrist, Dr. Hill, that Lauren does not suffer from a conduct disorder. Dr. Hill believes that an old diagnosis to be found in Lauren's file, which concludes that she has a "conduct disorder," is in fact "incorrect."

The Lights have been trained to deal with Lauren, and have been successful in redirecting her. In 1989, the Lights went to the Judevine Center for Autism for a 3 week training course. Aaron and Josh went to the training and attended it for 2 days.

Lauren's educational history continued when she left the segregated Neuwoehner School and transferred to the Southview School, a less segregated school for disabled children. Lauren was at Southview for 4 years.

Diane decided that Lauren was not doing well at Southview because the staff there was not meeting Lauren's academic needs "and behaviorally she had not improved at all." At home, Lauren was cursing and doing the sorts of things that a child would pick up from being in a class with behavior disordered children. Lauren learned cursing from being around behavior disordered children at Southview. Lauren was not gaining new knowledge and the Lights did not see Lauren making progress: "We weren't seeing her go forwards, and my husband and I hired an educational consultant," Carol Larkin. Larkin helped the Lights advocate for Lauren and assisted Diane in demonstrating to respondent Special School District (hereinafter SSD) that Lauren's educational goals were not being met at Southview. As a result of the meetings between the Lights and SSD, Lauren was transferred to the Riverbend School -- a less segregated school. Riverbend is a public school that has a self-contained classroom within it. During the year that Lauren was at Riverbend, she was not integrated into classes with her non-disabled peers. Nevertheless, Lauren did better at Riverbend, just being around other non-disabled students in the building. Lauren was verbalizing more and talking more and she was better able to control her behavior. Lauren was greatly improved at home and had more control over things that previously were beyond her control. Lauren was not as impulsive as before and she was able to reason things out better. Lauren would no longer bite at home. The reason for the decrease in biting was the way in which Lauren was approached and redirected by her family. The Lights were able to look at Lauren and determine when she was prepared to do something and "redirect and ignore her instead of thinking 'what is she going to do next?'"

Contingencies have worked well with Lauren. If Diane wants Lauren to do something and Lauren refuses, then Diane states: "Lauren as soon as you clean up your room let's go outside and play basketball." Lauren responds to that contingency. Consequently, the kicking episodes, along with the

biting episodes, became less frequent while Lauren was at Riverbend.

Diane believed that the redirection and contingencies the family used at home with Lauren would be successful at the Parkway Middle School, if the staff was to utilize those techniques. For instance, although there was testimony before the district court that Lauren pokes, kicks, and otherwise engages in unruly behavior with her classmates, that was not the behavior she displayed at home, because Aaron and Josh knew how to talk with Lauren and redirect her.

Until the 1993-94 school year, Lauren had never been in a classroom with her non-disabled peers. Lauren was able to go to classes for the first time during the 1993-94 school year with her non-disabled peers because of the efforts of her parents. At the beginning of the 1993-94 school year, Lauren went to school at the Parkway Central Middle School. Lauren was integrated into classes with her non-disabled peers part of the school day and in after school activities. Because of that interaction, Lauren greatly improved.

The Eyewitnesses

The main issue before the courts below was whether Lauren was so dangerous that she had to be immediately removed from the Parkway Central Middle School. While much testimony was presented to the trial court by the school districts concerning where Lauren Light should go if she were removed from Parkway, only a few witnesses testified who actually observed Lauren's behavior, either in or out of the classroom. Nevertheless, the district court and the Eighth Circuit relied primarily on testimony from non-eye-witnesses to Lauren's behavior. The only eye-witness mentioned by the lower courts in support of their opinions was Jane Galownia, the SSD Special Education Teacher.

Despite the twelve instances in which Galownia claims she had to seek the treatment of the school nurse because of injuries inflicted by Lauren, virtually all of the incidents involved Galownia allegedly being bitten, but her skin never being broken. Indeed, there was never treatment given by the nurse to Galownia other than to put ice on her arm pursuant to the claim of Galownia that she had been bitten, although, her skin was never broken, except for once in a very minor way. Nevertheless, Galownia never saw Lauren bite another student. But, Galownia testified that Lauren kicked other students and poked them on a daily basis.

However, these incidents of alleged misbehavior occurred throughout the school year, from September 1993 to April 1994. Indeed, Galownia testified that Lauren was no worse in April 1994 than she was in October 1993. The week that the TRO was sought by the school districts, to remove Lauren from public school by judicial fiat, was one of Lauren's best weeks. Nevertheless, Galownia did not think it odd that after a remarkably good week for Lauren, a TRO was sought to remove this disabled child from school. Yet, it was the first time Respondents had ever sought to remove a child from public school by judicial fiat through an injunction.

Because of Galownia's lack of expertise in the area of Lauren's disability, Galownia had to be trained by an expert therein before Lauren began school at Parkway Central Middle School in September 1993. The expert who taught Galownia, was Mary Granville. Granville met with Galownia and spent 4 days training her before Lauren came to school at Parkway Central Middle School. Granville made follow-up visits. Granville testified that Galownia was in need of training because Galownia's background was more with children with mental handicaps. Because of the behaviors that Lauren displayed, and because Galownia's lack of familiarity in the area, Granville had to spend much time talking to Galownia "about support strategies" for Lauren and what strategies were effective with her.

No major incident occurred anent Lauren when Granville was teaching Galownia. But, when Granville was not present, Galownia could not handle the situation on her own. At first, Galownia was unfamiliar with contingencies and redirection in regard to a child like Lauren. Galownia seemed receptive to learning techniques from Granville by which to redirect the frequency of Lauren's outbreaks. Thus, up until January 1994, Granville had a good relationship with Galownia. However, in January and February 1994, Granville felt that Galownia was under a lot of pressure from the administrators of the school districts. Galownia was not following the contingencies in Granville's plan and there was a tendency on Galownia's part to fail to redirect Lauren; Galownia began to deal with Lauren inappropriately. Galownia failed to comprehend the entirety of the plan drawn up by Granville. Thus, while Granville felt that Galownia needed more training, Galownia did not and therefore received none.

Suspension

On April 6, 1994, the parties concluded two non-sequential days of strenuous, and often contentious, meetings concerning an IEP for Lauren Light. Not coincidentally, on April 12, 1994, Lauren was accused of intentionally striking a classmate. A witness to this event was the ubiquitous Special Education teacher, Jane Galownia. Supposedly, Lauren struck another classmate on the head three times. (It has been later learned that this alleged incident may not have occurred as Jane Galownia and the school districts personnel claimed).

Nevertheless, the Assistant Principal at Parkway Central Middle School, an administrator from SSD, and Jane Galownia (the very witness to the event), surrounded and coerced Lauren Light at a so-called hearing at which she confessed to striking a classmate. This child, with an I.Q. below 70, was unrepresented and unsupported at this star chamber proceeding.

This child with disabilities, unable to fend for herself, was surrounded by three adult women who were no friends of Lauren and had made up their minds to suspend her. Lauren was suspended from school for 10 days. Although her mother had been called three times during that day, Diane Light was never informed that her child was to attend a hearing at which it was a foregone conclusion that she would be suspended.

The Lights believed that the so-called hearing and subsequent suspension of Lauren was a brazen and an intentional violation of the Americans with Disabilities Act. Therefore, they filed on April 18, 1994, a 4 count complaint for declaratory judgment, injunctive relief and damages, alleging that Respondents and certain individuals discriminated against Lauren on the basis of her disabilities and deprived her of liberty and property interests without affording her due process of law. The district court took evidence on this matter and issued a TRO in favor of the Lights.

Conversely, the school districts sought an injunction to remove immediately Lauren from the Parkway Central Middle School because she was "substantially likely to injure herself or another." The district court took evidence on this issue and ruled that Lauren be immediately removed from Parkway, even though the behavior had continued the entire two semesters of the school year and the school districts took no action until the Lights sought their own injunctive relief.

Lower Court Decisions

A 3 day hearing was held before the United States District Court, Eastern District of Missouri, Eastern Division, the Honorable George F. Gunn, Jr. presiding. On April 22, 1994, the day after the hearing was concluded, Judge Gunn issued an Order in which he granted the injunctive relief sought by the school districts and removed Lauren from Parkway Central Middle

School.

Judge Gunn determined that the issue before him was whether maintaining Lauren in her current educational placement was "substantially likely to result in injury either to . . .herself, or to others." (Appendix at 1). The court cited **Honig** v. **Doe**, 44 U.S. 305, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988) .

Judge Gunn decided that "maintaining Lauren Light in her current placement is substantially likely to result in injury either to herself or to others." (Appendix at 1). Because Judge Gunn granted an injunction to the school districts, he dissolved the temporary restraining order that he had issued on the first day of the hearing in favor of the Lights. That TRO was granted because Judge Gunn was of the belief that Lauren was denied due process at the so-called hearing at which she was suspended for 10 days on April 13, 1994.

Four days later, on April 26, 1994, Judge Gunn issued his Judgment in the matter which amplified upon his Order. (App. at 4). Judge Gunn stated that even though the "testimony revealed that while Lauren's behavior was no worse at the end of the school year than at the beginning, there has not been any improvement in the behavior." (Ap. at 7). Judge Gunn reviewed and summarized the evidence in support of the school districts and concluded that under the standard enunciated by this Court in **Honig,** his "concern must be the threat of injury to Lauren or others." (Ap. at 8).

In conclusion, while Judge Gunn Ordered the removal of Lauren from Parkway Central Middle School, he did not Order the place for Lauren's further education. Rather, the court left that decision to the school districts. The school districts then determined that the placement for Lauren ought to be the segregated Neuwoehner School, rather than the Britany Woods school, mandated by the most recent IEP, concluded on April 6,

1994. The Britany Woods School, while segregated to a degree, is far less segregated than the Neuwoehner School.

The Lights took an appeal to the Eighth Circuit.

The Eighth Circuit issued its opinion on December 2, 1994, and affirmed the decision of Judge Gunn to remove immediately Lauren from the Parkway Central Middle School. The Eighth Circuit rejected as a tautology the contention of the Lights that a disabled child must be shown to be "truly dangerous" as well as "substantially likely to cause injury." Therefore, the Eighth Circuit reviewed the evidence solely to ascertain whether Lauren was "substantially likely to injure herself or another." In measuring the evidence against that standard, the Eighth Circuit rejected the contention of the Lights that in order for there to be a "dangerous" child, that child had to act with intent to injure. The Eighth Circuit found that "the record exhaustively documents Lauren's almost daily episodes of aggressive behavior at Parkway Central Middle School." **Light v. Parkway Central Middle School**, 41 F.3d 1223, 1229 (8th Cir. 1994).

While the Eighth Circuit refused to define "injury," it indicated that Lauren was capable of inflicting "injury" because she would poke a student with a pencil, would slab teachers and students, and would throw crayons. Id. at 1229. Thus, the Eighth Circuit found that "the district court's findings are not clearly erroneous." Id. at 1229. This behavior, which the lower court deemed to warrant immediate removal, "had not changed over the previous two years." Id. at 1229.

The Eighth Circuit dismissed the contention of the Lights that Lauren's behavior amounted to no more than a nuisance and that the district court had failed to employ an adequate and specifically stringent definition of "injury."

It is the following conclusion of the Eighth Circuit that the

Lights believe is directly contrary to this court's decision and standard set forth in **Honig:**

"Bruises, bite marks, and poked eyes all constitute 'injuries' in the context of this analysis. More broadly, we reject the proposition that a child must first inflict serious harm before that child can be deemed substantially likely to cause injury." Id. at 1230.

However, the Eighth Circuit did agree with the contention of the Lights that a district court may not unilaterally remove a child with disabilities from public school until it has considered and ascertained that the school districts have made a reasonable accommodation to the child's disabilities in an effort to ameliorate whatever behaviors are deemed to be substantially likely to cause injury.

On January 11, 1995, the Eighth Circuit denied the petition for rehearing filed by the Lights. (Ap. at 38).

ARGUMENT

I

The Eighth Circuit misinterpreted and misapplied this Court's decision in Honig v. Doe, in that it ignored the dictate that a child with disabilities may only be removed from a public school by judicial fiat if that child is first found to be "truly dangerous." The Eighth Circuit and the district court chose to ignore that standard; instead, both lower courts chose to utilize the vague and ill-defined phrase "substantially likely to injure herself or others," upon which to justify the immediate removal of Lauren from public school.

Until now, no circuit court has interpreted the standard found in this Court's decision in **Honig v. Doe**, 44 U.S. 305, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988). That standard grants to a

district court the power to order the removal of a child with disabilities from school for more than 10 days because of dangerous behavior associated with and flowing from those disabilities.

The Lights argued both to the district court and to the Eighth Circuit, that in order for a disabled child to be removed from school for more than 10 days by the judiciary, it must be found that the child is "truly dangerous" and substantially likely to cause injury to herself or another. The district court never attempted to define "dangerous." The Eighth Circuit dismissed the argument of the Lights without analysis, stating: "We reject as tautological the contention of Lauren's parents that a disabled child must be shown to be 'truly dangerous' as well as substantially likely to cause injury. Their argument derives from a misreading of **Honig** and warrants no extensive rebuttal." **Light v. Parkway School District**, 41 F.3d 1223, 1228 (8th Cir. 1994).

The Lights do not believe that it is redundant to demand, as this Court has required, that only a child who is "truly dangerous" be removed from a school for more than ten days. To be "truly dangerous" is not the same thing as "substantially likely to cause injury to oneself or another." This is especially true when both the district court and the Eighth Circuit refused, to define "injury."

It is easy for a judge to view the evidence anent the behaviors of a child with disabilities and say that she is substantially likely to cause injury. But, that is a meaningless conclusion to draw. When any school aged child, whether disabled or not, throws a pencil across the room, injury may be inflicted depending upon where or upon whom the pencils lands. The difficulty with the decision of the Eighth Circuit is that one cannot tell if throwing a pencil is sufficient to result in the removal of a child with disabilities from school beyond the 10 day limit. Indeed, at the hearing before the district court, counsel for the

school districts argued that the throwing of a pencil could result in a loss of an eye and therefore it was an act that was substantially likely to cause injury to another. But, that is not the standard that this court set in **Honig**.

The only way to separate nuisance behavior from behavior substantially likely to result in injury, whatever "injury" may mean, is by first ascertaining whether a child is "truly dangerous." Nuisance behavior, such as the throwing of a pencil, can result in a significant injury requiring the assistance of a medical doctor in an emergency room. But it is not nuisance behavior that this court in **Honig** intended to be the foundation upon which a child with disabilities may be removed from school for more than 10 days. It is not the random chance of injury that is the defining standard; rather, as this court said, a child must be "truly dangerous" before court sanctioned expulsion can occur. We believe a child must be found to be "truly dangerous" before one can even consider the question of whether that child is substantially likely to injure herself or another.

In **Honig**, this Court rejected the argument of Honig, the California Superintendent of Public Instruction, that a "dangerous" exception ought to be read into the stay-put provision of 20 USC § 1415 (e)(3). This Court refused to find such a "dangerousness" exception.

"We think it clear, however, that Congress very much meant to strip schools of the *unilateral* authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students from school. In so doing, Congress did not leave school administrators powerless to deal with **dangerous** students; it did, however, deny school officials their former right to 'self-help' and directed that in the future the removal of disabled students could be accomplished only with the permission of the parents or, as a last resort, the courts."

Id. at 604. (Emphasis in bold added).

This Court noted that "conspicuously absent from § 1415(e)(3), however, is any emergency exception for **dangerous** students." (Emphasis added). The Court found itself "therefore not at liberty to graft onto the statute an exception Congress chose not to create." Id. at 605. But, this Court did not "leave educators hamstrung." Id. This Court referred to a Department of Education comment, 34 C.F.R. § 300.513 (1987), to the effect that a school district is not precluded from using its normal procedures for dealing with children who are "**endangering** themselves or others." Id. (Emphasis added). Such procedures may include the use of study carrels, time-outs, detention, or the restriction of privileges. In more drastic situations, where a student poses an "immediate threat" to the safety of others, officials may temporarily suspend him or her for up to 10 school days. Id.

More importantly, those cases where the parents "**of a truly dangerous child**" adamantly refuse to permit any change in placement, school officials can invoke the aid of the courts under § 1415(e)(2), which empowers courts to grant any appropriate relief. This Court determined that § 1415(e)(3) did not operate to limit equitable powers of district courts to temporarily enjoin "**a dangerous disabled child**" in appropriate cases. Id. at 606. Of course, the burden in such cases, were lies with the school district. Id.

Then, this Court summed up what it had concluded by stating, "in short, then," school officials could seek injunctive relief under § 1415(e)(2) and (3) if they overcame the presumption in favor of a child's current educational placement "by showing that maintaining the child in his or her current placement is substantially likely to result in injury either to himself or herself, or to others." Id.

Unfortunately, that last quoted phrase is the only standard utilized by the district court or the Eighth circuit in determining

that Lauren ought to be immediately removed from the Parkway Central Middle School, by judicial fiat.

We reject the conclusion of the Eighth Circuit that it was a tautology to demand that the exact words used by this court in **Honig** be the defining standard in ascertaining whether a child with disabilities may be removed from class for more than 10 days. In **Honig**, this Court set up a hierarchy of behavior leading to removal by judicial fiat of a child with disabilities for more than 10 days. First, there is no emergency exception to the stay-put provision of the IDEA. Second, for children who are **endangering** themselves or others, school districts may use their traditional methods for dealing with such behavior, such as study carrels, etcetera. Third, for children with disabilities who are an **immediate threat**, school districts may suspend said child for up to 10 days. Fourth, only those children with disabilities who are **truly dangerous** may be removed by judicial fiat, pursuant to a request for a TRO.

Clearly, removal by court order is meant for only the most serious incidents of the most threatening and exigent kind. Court removal is not meant for those children with disabilities whose cumulative behavior has become tiresome, but who have injured no one and have engaged in no spectacular event manifesting itself in an emergency.

While the Eighth Circuit listed evidence suggesting that Lauren was substantially likely to injure herself or another, it refused to consider or define "dangerousness." Instead, the Eighth Circuit piled nuisance behavior on top of nuisance behavior, and found that Lauren was substantially likely to injure herself or another, even though she has been engaging in the same behavior for over two years, and no one has been "injured." Certainly, Lauren has not been injured. The only other possible object of injury, the Special Education Teacher, Jane Galownia, was under instructions from the administrative staff of the school

districts to document each and every possible incident of a misbehavior by Lauren for the purpose of getting her out of the regular school because parents of other students were complaining about Lauren. It was a political decision, we believe, that caused Galownia to document events when she went to the nurse, even though she did not need medical treatment; Galownia went to the nurse repeatedly where she received no treatment, and many times when the only treatment was the placement of an ice bag on her arm.

This is the "injury" that the Eighth Circuit felt sufficient to support the removal of this child with disabilities from a regular classroom for more than 10 days.

We believe this decision by the Eight Circuit flaunts this Court's explicit directive in **Honig** to first find a child "truly dangerous" before removal may be mandated by judicial fiat. We believe that the phrase used by this Court, "substantially likely to result in injury either to herself, or to others," cannot be read without looking to other parts of this Court's decision in **Honig**. In those other parts, quoted above, this Court repeatedly referred to "dangerous" as the only basis upon which to enjoin a child with disabilities from school. Most tellingly, this Court stated that school districts could seek an injunction only when the parents of a "**truly dangerous child**" adamantly refused to permit any change of placement. Implicit is the command of this court that a child with disabilities be removed from school by judicial fiat only in an emergency situation. That did not exist here. Lauren's behavior was no worse in April 1994, than 2 years earlier. The school districts sought a TRO only after the Lights first announced they would seek one. This is not the dangerous behavior sudden and exigent nature that this court found sufficient to warrant immediate removal by court order.

Nowhere in the Order of the district court, or the Judgement of the Eighth Circuit, is there found a discussion of

whether Lauren was "**a truly dangerous child**." Both the district court, and the Eighth Circuit, acted as roving commissions in rooting among the facts, without standards or measures to guide them. In their unguided and unchanneled review of the testimony, the Eighth Circuit found that because Lauren had kicked, bitten, and poked for some eight months at the Parkway Central Middle School, she suddenly, in April 1994, became "substantially likely to injure herself or others." After that etherial and undisciplined analysis, the Eighth Circuit was finished and so was Lauren at the Parkway Central Middle School.

The Eighth Circuit further misread and misconstrued **Honig** when it rejected the argument of the Lights that a child with mental disabilities cannot be "dangerous" within the meaning of **Honig** when that child's disability renders her unable to intend the injuries she inflicts. "A child's capacity for harmful intent plays no role in this analysis. Even a child whose behaviors flow directly and demonstrably from her disability is subject to removal where that child poses a substantial risk of injury to herself or others." **Light v. Parkway C-II School District**, 41 F.3d 1223, 1228 (8th Cir. 1994).

As the Lights argued in their Motion for Rehearing before the Eighth Circuit, the conclusion of that court does violence to this Court's standards set forth in **Honig** because if a child has no intent to harm anyone, and does so only because her disability makes the impulsive action occur, then redirection can result in a decrease of the unwanted behaviors. Therefore, intent ought to be an integral part of the analysis because it bears directly upon whether the school districts have made a "reasonable accommodation" to the child's disability.

Further, the Eighth Circuit mistakenly believed that the Lights proposed that "a child must first inflict serious harm before that child can be deemed substantially likely to cause injury." **Light**, 41 F.3d at 1230. The Eighth Circuit came to this

erroneous conclusion because it failed to adopt an inclusive and objective-based standard which would apply in toto when an analysis of the facts is conducted. In this case, Lauren harmed or "injured" no one for over two years. We reiterate our argument that in the context of these facts, the failure to cause any "injury" for over two years is evidence that this child is more a nuisance than "truly dangerous," and can be redirected. In such a context, where there has never been a serious injury, expulsion must await that occurrence. Removal by court order cannot occur on the basis of cumulative behavior made up of only non-violent, non-injurious incidents of nuisance behavior. Court removal is appropriate only in an emergency situation when a "dangerous" child has suddenly caused an "injury."

The opinion of the Eighth Circuit is tantamount to a retreat from the standard found in **Honig**.

II.

Both the district court and the Eighth Circuit acted as roving commissions. Neither court defined the terms they used. There is no definition of "injury," and the word used by this court in Honig, "dangerous," is ignored. Both courts refused to consider intent as a measure by which to determine injury. Neither court attempted to define an objective standard by which to differentiate between nuisance behavior and that which causes a child to be "dangerous," and "intentionally" inflict an "injury."

Neither court defined "injury," nor what amounted to a "substantial injury." Both courts ignored the requirement of **Honig** that a child be removed by judicial fiat only if she is "truly dangerous." Without definitions, and without standards, both courts meandered through the facts and relied upon their collective instincts to determine whether Lauren ought to be removed immediately from Parkway Central Middle School.

The Eighth Circuit blithely, and with hyperbole, rejected the arguments of the Lights in regard to the use of the "dangerous" standard, and the need to differentiate between nuisance behavior and a true injury. But, the Eighth Circuit never discussed the issue raised by the Lights in regard to a roving commission.

The Lights argued in the Eighth Circuit that the district court acted as a roving commission because no standards and no definitions were set down by which the trial court was to apply **Honig** to the facts before it. The Eighth Circuit refused to acknowledge that there was an issue raised by the Lights in regard to a roving commission.

The concept of a roving commission has long been an anathema to American jurisprudence. This court in **Honig** did not articulate an explicit standard to be followed by a district Court in conducting the requisite balancing test. The Eighth Circuit lent no guidance. The Lights respectfully request that this Court now grant certiorari so that it may create those categories of analysis for cases like this, such as those found in **Turner v. Safley**, 482 U.S. 78, 96 L.Ed.2d 64, 107 S.Ct. 2254 (1987); **Meritor Savings Bank v. Vinson**, 477 U.S. 57, 91 L.Ed.2d 49, 106 S.Ct. 233 (1986); and, **St. Mary's Honor Center v. Hicks**, _US_, 113 S.Ct. 2742, 125 L.Ed.2d 407 (1993).

Of particular interest is the Third Circuit case dealing with the IDEA, and a difficult child with disabilities, in which explicit standards were set down, and which should have been followed by the Eighth Circuit: **Oberti v. Board of Education**, 995 F.2d 1204 (3rd Cir. 1993). While the Eighth Circuit cited to **Oberti**, it overlooked the importance of the case. **Oberti** dealt with the inclusion of a child with disabilities in the regular classroom. The Third Circuit discussed the mainstreaming requirements of the IDEA. But the lesson of **Oberti**, which is instructive here, is that the Third Circuit found one of its "principal tasks" to be the

provision of "standards for determining when a school's decision to remove a child with disabilities from the regular classroom and to place the child in a segregated environment violates IDEA's presumption in favor of mainstreaming."

The Third Circuit concluded, that in determining whether a child with disabilities can be educated satisfactorily in a regular class with supplementary aids and services (the first prong of the two-part mainstreaming test adopted by **Oberti**), the court should consider several factors, including: 1) Whether the school district has made reasonable efforts to accommodate the child in a regular classroom; 2) The educational benefits available to the child in a regular class, with appropriate supplementary aids and services, as compared to the benefits provided in a special education class; and, 3) The possible negative effects on the inclusion of the child on the education of the other students in the class. If, after considering these factors, the court determines that the school district was justified in removing the child from the regular classroom and providing education in a segregated, special education class, the court must consider the second prong of the mainstreaming test -- whether the school has included the child in school programs with non-disabled children to the maximum extent appropriate.

Just as the Third Circuit set out standards in **Oberti**, the Lights asked the Eighth Circuit to delineate standards for cases decided pursuant to **Honig**. The suggestion went as follows:

This case ought to be remanded to the district court with the direction that it use the following objective measures by which to analyze the facts before it: 1) How long has the activity been going on; 2) What has the school district done to reduce the frequency of the activity; 3) What was the response of the school district when the activity first occurred; 4) Is the failure of the school districts to seek temporary restraining orders based on earlier incidents an indication that the child is not "truly

dangerous," but just a nuisance; 5) Whether the police were called; 6) Whether there was an injury that required medical attention; 7) Whether the injury was intentionally inflicted; 8) If the incident was not intentional, whether more training of staff would lessen the frequency or severity of the aggressive behavior.

The Lights did not suggest that the Eighth Circuit pick and choose among objective measures. Yet, that is exactly what both lower courts did, and by so doing, the Eighth Circuit misconstrued and mischaracterised the arguments made by the Lights. The Eighth Circuit stated:

"In general, the Lights claim that the District Court failed to employ an adequately specific and stringent definition of 'injury.' We disagree. As an initial matter, we emphatically reject the contention that an 'injury' is inflicted only when blood is drawn or the emergency room visited. Bruises, bite marks, and pokes eyes all constitute 'injuries' in the context of this analysis. More broadly, we reject the proposition that a child must first inflict serious harm before that child can be deemed substantially likely to cause injury." **Light** at 41 F.3d 1230.

The Lights asked the Eighth Circuit to analyze the suggested factors based upon the facts presented at the hearing. The Eighth Circuit incorrectly chose to select a few of the objective categories suggested by the Lights, and use exaggeration and hyperbole to cast them aside. While the Eighth Circuit found that bruises, bite marks, and poked eyes all constitute injuries in the context of this analysis, the reader has no idea what that "context" is. Certainly, bruises and bite marks are occasioned everyday on the school playground, but court-ordered expulsion is not the result. The Eighth Circuit dismissed summarily and without analysis or logical inquiry the need for serious injury, but that is what this Court contemplated in **Honig** when it demanded that only a "truly dangerous child" could be expelled from school by judicial fiat for more than 10 days.

Rather than single out one objective measure and defeat it with hyperbole, the Lights urged the Eighth Circuit to consider each criteria in the context of the facts of this case, fairly found.

Now, the Lights request that this Court grant certiorari and issue an opinion defining the contours of **Honig** and set out the standard by which reasoned analysis is to follow. Such an analysis might follow these suggested lines:

1) Lauren's behavior was the same all year long. The school districts testified that the urgency in seeking a TRO was due merely to the cumulative effect of the continuing behaviors. However, no single behavior was found to result in an "injury," within the meaning of **Honig**; yet, it was the argument of the school districts that the accumulation of nuisance behaviors amounted to "injury," within the meaning of **Honig.**

But, if Lauren's behaviors were so bad, why did the school districts not seek a TRO sooner? Why did the school districts seek a TRO only after the Lights sought their own injunction; the evidence supports the inference that the school districts sought their own injunction because they got tired of dealing with Lauren, and her parents, and not because Lauren was a "truly dangerous child."

2) The police were never called because of activity engaged in by Lauren. No one was ever "injured." While Galownia, the Special Education Teacher for Lauren, went to the nurse, she never received medical attention. Most probably, the reason for the visits was to document perceived misbehavior by Lauren, not because Galownia suffered any real injury. How then can it be that now there is a substantial likelihood that Lauren will injure someone? "Injury" must be defined as that harm which requires medical attention. Thus, the "substantial likelihood of injury" to be avoided is that which requires a physician's care. Otherwise, a school district could send its teachers and students to

the school nurse for a ice bag and claim "injury." That is exactly what happened here. To avoid this subterfuge, the care of a physician must be the defining standard.

3) Lauren is incapable of forming the intent to harm another. On occasion, she acts up because of her disability. She does not mean to hurt anyone; in fact, she is charming and likable. She is very social. If Lauren is incapable of forming the intent to hurt another, then she can be redirected. Every witness who actually worked with Lauren, aside from Galownia, testified that they were never bitten and that they controlled Lauren with proven techniques. There was considerable testimony that Lauren could be redirected and that with proper training of staff, Lauren's behaviors would decrease and she could be successful at Parkway.

The Lights believe that the Eighth Circuit erred when it found that a "child's capacity for harmful intent plays no role in this analysis." Quite to the contrary, if a child has no intent to harm anyone, and does so only because her disability makes the impulsive action occur, then redirection can result in a decrease of the unwanted behaviors. Therefore, intent ought to be an integral part of the analysis because it bears directly upon whether the school districts have made a "reasonable accommodation" to the child's disability.

In summary, on this point, this Court should issue its writ of certiorari, and adopt an analysis and standards, like those suggested above, by which district courts and circuit courts alike are to review the behaviors of a child that flow from a disability. If this Court does not grant certiorari, then the likelihood exists that other children with disabilities will be denied the right Congress gave to them in the IDEA to participate to fullest extent possible in public schools with their non-disabled peers. If this court does not grant Certiorari, there is every likelihood that all district courts will follow the opinion of the Eighth Circuit and refuse to define the crucial terms and refuse to channel the

analysis, and refuse to use objective standards.

The Lights pray that this Court grant certiorari so their child will not suffer from the incompetent education provided to her in a segregated setting with children who are disabled in a manner far worse than Lauren and who cannot speak. Lauren now has classmates who are not positive role models. If this court does not grant certiorari, school districts will feel free to once again lock away the unattractive, the difficult, and the unfortunate child with disabilities who wants only to participate in life with her non-disabled peers.

III

The United States District Court erred when it denied the request of the Lights "to reopen the hearing." During the 3 days of hearing, the school districts presented much evidence in regard to where Lauren was to go to school and why Lauren was incapable of being educated at Parkway. The day before the District Court was to rule, the undersigned learned of extraordinary new evidence indicating that some teachers employed by the Special School District felt that Lauren could be educated at Parkway. In a letter to the court, the undersigned stated the names of those potential witnesses and the subject of their anticipated testimony.

Although the Lights raised this issue on appeal to the Eighth Circuit, and it was discussed during oral argument, no mention has been made of it in the Eighth Circuit opinion. Yet, the thrust of the testimony that was improperly foreclosed to the Lights had the likelihood of being decisive in the decision.

During the 3 days of hearing before the United States District Court, various employees of the school districts testified in support of their employers' position. In essence, those employees testified that Lauren could be better educated at the

wholly segregated Neuwoehner School. Testimony was presented in the district court from the school districts indicating that Lauren's behavior had continued without amelioration and therefore she was no longer appropriately placed at Parkway.

The hearing, held in St. Louis, ended in the afternoon of Thursday, April 21, 1994. The district court indicated that it would rule by 5:00 p.m. the following day, Friday, April 22, 1994.

After the hearing, the undersigned returned to his office in Jefferson City, Missouri -- about 130 miles away. Much later that evening, the undersigned received information from Diane Light that she had received a phone call from an SSD employee. That information indicated that there were SSD employees, educators and experts who believed that Lauren could be educated at the Parkway Central Middle School.

The undersigned faxed a letter to the district court on Friday, April 22, 1994, requesting that the hearing be held open until the following week so that the Lights could file affidavits and prepare a Motion requesting that the hearing be reopened. Thereafter, the parties exchanged letters faxed to the district court in regard to whether the hearing ought to be reopened. The district court in its Order of April 22, 1994, denied the request of the Lights to reopen the hearing.

This denial of this request was in error. The evidence obtained by the undersigned indicated that there were professionals within SSD who believed that Lauren could be successfully educated at the Parkway Central Middle School and that she need not be segregated with children far more disabled than she. The undersigned posited that he could not have received this information any sooner, that it may be dispositive, and that the case should be reopened therefore.

The denial of their request deprived the Lights of their

right to due process and foreclosed them from establishing that Lauren's behavior was not as bad as the employees of the school district testified it to be. The egregious nature of this denial, never discussed by the Eighth Circuit in its opinion, is symbolized in some fascinating language found in the Eighth Circuit opinion.

As that court meandered through the facts in its effort to support the removal of Lauren from the Parkway Central Middle School, it engaged in a selective recitation of examples meant to establish that Lauren was in need of immediate removal from her non-disabled peers and the public school. In this effort, the Eighth Circuit related an incident that allegedly occurred on April 12, 1994. The Eighth Circuit reviewed the incident as though it did occur, and stated: "On April 12, 1994, Lauren grabbed the hand of another disabled student and struck him three times on the forehead and head, raising her hand back to her head with each blow. Later that day at the suspension hearing, Lauren kicked Galownia several times." **Light**, 41 F.3d at 1229. It is this incident that triggered the filing by the Lights of their Complaint and request for injunction. Lauren was subjected to a so-called hearing and, based upon a confession of a child with an I.Q. of less than 70, suspended from school for 10 days. This violation of the Americans with Disabilities Act was the subject of the Complaint filed by the Lights. Yet, incredibly, the Eighth Circuit used this event to support its removal of Lauren from the Parkway Central Middle School.

We posit that the event just did not happen that way. There was an eyewitnesses to the event never known to the Lights, or the undersigned, until that phone call by the SSD employees to Diane after the hearing was over. After the hearing before the United States District Court, in a related case, the Lights, and the undersigned, had an opportunity to take the deposition of one of those employees, who testified under oath that she thought it was likely that Lauren struck this other child accidentally. This was an eyewitness known to the school

districts and known by them to have testimony different from that presented at the hearing before the district court. Yet, the Lights and the undersigned had no way of knowing about this individual's testimony until such time as she made it known to the Lights. This SSD employee made her opinion known to the Lights after the hearing, because it appears she was instructed to keep silent during the hearing. She felt that when the district court ruled, the matter was over, and she could speak out.

This new testimony supports the contention of the Lights that Lauren only struck this other child accidentally, not intentionally like Galownia said, but because of Galownia's incompetence and failure to engage in the proper techniques to make Lauren a successful student. Jane Galownia was one of the adult women in the room with Lauren at the so-called hearing when Lauren was unrepresented, without aid or assistance, and pursuant to which she was suspended.

The Eighth Circuit implies in its opinion that Lauren is uncontrollable by the fact that she kicked Galownia several times during the so-called hearing after which Lauren was suspended. Yet it was the district court that remarked that this behavior established that Lauren did not have any idea what was going on at the hearing; otherwise, why would she engage in the same behavior at that hearing that she was being suspended for.

The Lights were foreclosed by the district court from presenting favorable testimony. This issue was not mentioned by the Eighth Circuit. Yet, the very evidence that the Eighth Circuit uses to support Lauren's removal, is subject to serious attack and impeachment by the very witnesses the Lights were foreclosed from presenting. This violation of due process ought to and must be rectified by this court through its issuance of a writ of certiorari.

CONCLUSION

In light of all the foregoing, the Lights respectfully request that this Court issue its Writ of Certiorari to the Eighth Circuit and reverse its decision. In that reversal, the Lights request that this Court remand the case to the district court for the taking of new evidence, and for an analysis based upon objective standards with which to measure the facts and determine whether Lauren was "dangerous."

Respectfully Submitted,
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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MARTIN LIGHT, DIANE LIGHT and LAUREN LIGHT, a minor, by and through MARTIN and DIANE LIGHT, her next friends,	)	
Plaintiffs,	)	
vs.	)	No. 4:94CV00762 GFG
PARKWAY C-2 SCHOOL DISTRICT and the SPECIAL SCHOOL DISTRICT of ST. LOUIS COUNTY, DAN NATALE, ANNE RITTER, TONI STRIEKER and JANE GALOWNIA.	)	

ORDER

This issue before the Court is whether "maintaining [Lauren Light] . . . in . . . her current placement is substantially likely to result in injury either to . . . herself, or to others." Honig v. Doe, 484 U.S. 305, 328 (1988).

The Court finds from the evidence before it that maintaining Lauren Light in her current placement is substantially likely to result in injury either to herself or to others.

Accordingly, the Court will enter an injunction in favor of the Parkway C-2 School District and the Special School District of St. Louis County under which Lauren Light should be moved from her current education placement.

On April 19, 1994, the Court found that Lauren Light was not afforded appropriate due process in relation to her ten day suspension from the Parkway Central Middle School and entered a Temporary Restraining Order (TRO) in favor of Martin Light, et al. However, in light of the Court's finding relating to Lauren Light's current educational placement,

IT IS HEREBY ORDERED that the TRO entered on April 19, 1994, is hereby dissolved and help for naught.

IT IS FURTHER ORDERED that the request of Martin Light, et al. to reopen the hearing is denied.

IT IS FURTHER ORDERED that the injunctive relief requested by the Parkway C-2 School District and the Special School District of St. Louis County removing Lauren Light from her current educational placement is granted.

Written opinion to follow.

Dated this _____ day of April, 1994.

_____

Appendix 3

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

MARTIN LIGHT, DIANE LIGHT AND LAUREN LIGHT, a minor, by and through MARTIN and DIANE LIGHT, her next friends,	)	
Plaintiffs,	)	
vs.	)	No. 4: 94CV00762 GFG
PARKWAY C-2 SCHOOL DISTRICT and the SPECIAL SCHOOL DISTRICT OF ST. LOUIS COUNTY, DAN NATALE, ANNE RITTER, TONI STRIEKER and JANE GALOWNIA,	)	
Defendants.	)	

JUDGMENT

This matter is before the Court following a hearing on the motion of Parkway C-2 School District and the Special School District of St. Louis County for an injunction removing Lauren Light from her current educational placement.

As noted previously in the Court's Order dated April 22, 1994, the issue before the Court is whether "maintaining [Lauren

Light] . . . in . . . her current placement is substantially likely to result in injury either to . . . herself, or to others." Honig v. Doe, 484 U.S. 305, 328 (1988). The Court conducted a three-day hearing on the issue pursuant to 20 U.S.C. § 1415(e)(2) and the parties submitted post-trial briefs including findings of fact and conclusions of law.

The relevant evidence establishes that Lauren Light is a thirteen year old student with multiple mental disabilities, including behavioral disorder (with autistic features), organic mental disorder, mild mental retardation and language disorder. During the 1993-1994 school year, Lauren has been enrolled as a student at the Parkway Central Middle School (the school) in a self-contained classroom for students with mental disabilities. Lauren has also been integrated into a normal classroom for instruction in art, physical education and library and computer lab. Lauren receives her education at the school pursuant to an Individualized Education Program (IEP) developed especially for her and receives the attention of one full-time teacher and one

teacher's aide who are certified by the State of Missouri to teach students with mental handicaps.

During the course of the school year, Lauren has exhibited aggressive behavior towards her teachers and other students on numerous occasions. This behavior includes biting, slapping, kicking, poking, jabbing with pencils or other sharp instruments, and throwing objects at individuals. The testimony revealed that while Lauren's behavior was no worse at the end of the school year than at the beginning, there has not been any improvement in the behavior. The incidents of aggressive behavior continue to occur regularly and some recent incidents have resulted in other students being taken to the nurse's office.

The Individuals with Disabilities Act (IDEA) creates a presumption in favor of mainstreaming or placing disabled children in the least restrictive environment. 20 U.S.C. § 1412(5)(B). When a disabled child's current educational placement is challenged, § 1415(e)(3) creates a presumption in favor of maintaining the child in her current placement. See

Honig v. Doe, supra. However, that presumption may be overcome by school officials if they show that "maintaining the child in . . . her current placement is substantially likely to result in injury either to . . . herself, or to others." Id.

The evidence clearly establishes that Lauren continues to exhibit aggressive behavior which, fortunately, has not resulted in serious harm to her teachers or other students. Lauren has slapped several other students in the face or on the head, slapped herself, thrown pencils and other objects at both disabled and non-disabled students, poked another student in the stomach with a pencil, and bitten one teacher with enough strength that another teacher was required to pull Lauren's mouth off of the first teacher's finger. The court is convinced that should this behavior continue in the Parkway Middle School, Lauren will either injure herself or another.

Lauren's parents argue that a change in placement will not benefit Lauren. The Court is not unsympathetic to the ramifications that may result from a change in Lauren's placement.

However, under the standard enunciated in Honig, the Court's concern must be the threat of injury to Lauren or others. For that reason the Court will not address the school district's arguments relating to the impracticability of training its entire faculty and student body to respond to Lauren's needs, as urged as a solution by Lauren's parents. Neither will the Court speculate as to the educational placement most appropriate and receptive to Lauren's needs. The Court is not authorized by the IDEA, or the Supreme Court's holding in Honig, to fashion a program suitable to those needs.

In light of the Court's finding, however, the Court concludes that the Parkway Middle School is not the appropriate location for Lauren's current educational placement and will therefore enter an injunction in favor of the Parkway C-2 School District and the Special School District of St. Louis County under which Lauren Light shall be moved from her current educational placement.

This memorandum, together with the Court's Order dated

April 22, 1994, represents the final judgment of this Court and is appealable from the date of this judgment pursuant to Fed. R. App. P. 4(2).

Dated this _____ day of April, 1994.

_____

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

MARTIN LIGHT, DIANE LIGHT and LAUREN LIGHT, a minor, by and through MARTIN and DIANE LIGHT, her next friends,	)	
Plaintiffs,	)	
v.	)	No. 94-2333
PARKWAY C-2 SCHOOL DISTRICT and the SPECIAL SCHOOL DISTRICT OF ST. LOUIS COUNTY, DAN NATALE, ANNE RITTER, TONI STRIEKER and JANE GALOWNIA,	)	
Defendants.	)	

***1224** Michael H. Finkelstein, Jefferson City, MO, argued (Kevin Thompson and Sara Thompson, on the brief) for appellants.

James G. Thomeczek, St. Louis, MO, argued (Teri Goldman, on the brief), for appellees.

Before FAGG, Circuit Judge, HEANEY, Senior Circuit Judge, and BOWMAN, Circuit Judge.

HEANEY, Senior Circuit Judge.

This appeal concerns a school district's attempt to change the educational placement of an allegedly dangerous mentally disabled child. Two issues are raised on appeal: (1) whether the Supreme Court's holding in Honig v. Doe, 484 U.S. 305, 108 S.Ct. 592, 98 L.Ed.2d 686 (1988), requires a district court to find that a child is not only "substantially likely to cause injury" but also "truly dangerous" before sanctioning a transfer, and (2) whether a school district must make a reasonable accommodation of the child's disability before it can change her placement. We reject the former contention, but agree with the latter. We hold that the district court in this case erred by refusing to consider whether Lauren Light's disabilities had been reasonably accommodated. Nevertheless, based upon our independent review of the record, we conclude that a reasonable accommodation was made, and we affirm the court's order that Lauren Light be removed from her current placement.

I. FACTUAL BACKGROUND

Lauren Light is a thirteen-year-old child with multiple mental disabilities. She has been diagnosed at various times as demonstrating behavioral disorder, conduct disorder, pervasive developmental disorder, mild to moderate mental retardation, certain features of autism, language impairment, and organic brain syndrome. Behind these diagnostic labels stands a child whose condition leaves her prone to impulsive, unpredictable, ***1225** and aggressive behavior. According to her parents, Lauren is "sometimes defiant, easily frustrated, irritable, impulsive, and easily distracted." Plaintiffs' Motion for Temporary Restraining Order at 2. Moreover, Lauren "sometimes exhibits aggressive behaviors such as kicking, biting, hitting and throwing objects." Id.

For the 1993-94 school year, Lauren was enrolled in a self-contained classroom for students with mental disabilities at Parkway Central Middle School, a public middle school in Chesterfield, Missouri. The classroom is operated by the Special School District ("SSD") of St. Louis County, a public entity

devoted to educating children with special needs. During the prior school year, Lauren had been placed in a self-contained classroom at Riverbend Elementary School. Seeking greater educational opportunities for Lauren, her parents advocated for and obtained a transfer to Parkway Central Middle School, arguing that Lauren's behavior might improve amid similarly-aged peers.

Federal law requires disabled children like Lauren to be educated pursuant to an Individualized Education Program ("IEP"), a comprehensive document which sets forth objectives, policies, and guidelines and which governs their day-to-day schooling. Developed by a team of educators, specialists, consultants, administrators, and her parents, Lauren's IEP outlined an extensive set of duties on the part of the SSD to accommodate Lauren's disabilities. Lauren's IEP required that she have two-on-one staff support at all times. Thus, in addition to the classroom teacher assigned to her room, Lauren was accompanied by one full-time teacher, Jane Galownia, and on full-time teacher's

assistant, Lynn Wilson, throughout the school day. Both Galownia and Wilson have been certified by the State of Missouri to teach students with mental handicaps, behavioral disorders, and learning disabilities.

In addition, the SSD provided special training to members of the staff who regularly came into contact with Lauren, including training in behavior management, inclusion, and crisis prevention and intervention. To ease the transition from Riverbend, the SSD agreed to retain the services of a consultant selected by the Lights, Mary Granville of the Judevine Center for Autistic Children. Granville had worked with Lauren at Riverbend to facilitate her inclusion in the regular school environment, and performed a similar role in planning for and assisting with Lauren's transition to Parkway Central Middle School. Lauren's curriculum included speech therapy, occupational therapy, physical therapy, instruction in daily living skills, adapted physical education, functional academics, and weekly community access opportunities. Lauren's teachers kept

daily logs of her activities and behavior and provided daily reports to her parents. Outside of the special education classroom, Lauren was enrolled in several courses in the regular classroom setting with her nondisabled peers, including physical education, art, computer lab, home economics, and library. The SSD provided staff support for Lauren to participate in after-school activities. In September of 1993, the SSD agreed to a request by Lauren's parents that she be provided music therapy twice a week. When Lauren's music therapist became ill, the SSD hired a replacement and increased the frequency of the lessons to three a week to make up for lost instructional time. No other SSD student was provided with music therapy.

At Parkway Central Middle School, Lauren exhibited a steady stream of aggressive and disruptive behaviors, such as biting, hitting, kicking and poking persons, throwing objects, and turning over furniture. School records document that in the two years prior to her suspension Lauren committed eleven to nineteen aggressive acts per week, with a mean of fifteen per week. Her

daily tally of aggressive acts ranged from zero to nine, with a mean of three per day. Of these incidents, approximately thirty required the attention of the school nurse.

The record suggests that Lauren's aggressive behaviors had a negative effect on the educational progress of the five other special education students in Lauren's program. The teacher in charge of the self-contained classroom, Suzanne Seibel, reported that the class was rarely able to complete lesson plans due to Lauren's frequently disruptive behavior. In letters to the director of special ***1226** education for the SSD, parents of some of the other students in Seibel's class expressed concerns that the classroom environment had become tense and stressful, that their children's academic and social progress had slowed or halted, and that the class's field trip schedule had been significantly curtailed. One student required after-school academic support to compensate for the disruptions caused by Lauren's behavior.

Beginning in November 1993, members of Lauren's IEP team began a process of re-evaluation. Together with Lauren's

parents and their attorney, the IEP team met for a full day on March 23, 1994. The team concluded that a change of placement was in Lauren's best interest. Also on the agenda was the request of Lauren's art teacher that Lauren be removed from the art class due to her consistently disruptive behavior toward the other students. The Lights objected to any such removal and requested an administrative hearing on that issue. As a result, the Lights invoked the "stay-put" provision of 20 U.S.C. s 1415(e), which stayed any change in Lauren's placement pending the resolution of the administrative proceedings. The team, the Lights and their attorney reconvened on April 6, 1994, to complete the proposed revision of Lauren's IEP, and to address the team's conclusion that Lauren should be moved to a self-contained classroom for children with autism in a neighboring school district. Lauren's parents disagreed with any change in her placement and exercised their procedural due process rights under federal and Missouri law.

On April 12, during art class, Lauren grabbed and tugged

the hand of another special education student. With her free hand, Lauren then hit the student three times on the head. Later that day, following an informal hearing at which neither of Lauren's parents was present, the principal of Parkway Central Middle School imposed a ten-day suspension on Lauren for her behavior. Under federal and Missouri law, a suspension of ten days or less does not constitute a change of placement, and thus will not invoke the stay-put requirement. Mo.Rev.Stat. s 167.171 (1986).

II. PROCEDURAL HISTORY

Lauren's parents brought this action in the district court seeking to have the suspension lifted because Lauren was not afforded due process. Parkway School District and the SSD counterclaimed and invoked the court's equitable power to remove Lauren from Parkway pending the resolution of the Lights' administrative challenge to the proposed revisions to Lauren's IEP, including the proposed change in placement. 20 U.S.C. s 1415(e)(2). Parkway and the SSD argued that Lauren's aggressive behaviors presented a substantial risk of injury to

herself and others in her current educational placement. After one day of testimony, the district court ruled that Lauren had been denied due process and granted the Light's motion for a temporary restraining order. Noting that her parents were not specifically informed of the suspension hearing, the court apparently believed that Lauren's disabilities rendered her unable to advocate on her own behalf and unable to understand why she was being suspended. Following two additional days of testimony, however, the court vacated the temporary restraining order and instead granted the school districts' motion for an injunction removing Lauren from Parkway Central Middle School. The court found that "maintaining Lauren in her current placement is substantially likely to result in injury either to herself or to others." The court refused to inquire into the adequacy of the school districts' efforts to accommodate Lauren's disabilities. The court further declined to make any assessment as to the best alternative placement for Lauren.

III. THE INDIVIDUALS WITH DISABILITIES

EDUCATION ACT

The Individuals With Disabilities Education Act (IDEA) codifies the goal that "all children with disabilities have available to them . . . a free appropriate public education which emphasizes special education and related services designed to meet their unique needs. . .." 20 U.S.C. s 1400(c). Like its predecessor statute, the Education for All Handicapped Children Act of 1975, the IDEA provides certain federal funds to states whose policies "assure[] all children with ***1227** disabilities the right to a free appropriate public education." Id. s 1412(1).

At the heart of the IDEA lie two broad mandates, one substantive and one procedural. First, the IDEA seeks to guarantee the educational rights of disabled children by requiring policies of inclusion. Specifically, schools must assure that, to the maximum extent appropriate, children with disabilities . . . are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the regular educational environment occurs only

when the nature of severity of the disability is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily. . .. Id. s 1412(5)(B). As the Third Circuit has recently reiterated, "this provision sets forth a 'strong congressional preference' for integrating children with disabilities in regular classrooms." Oberti v. Board of Educ., 995 F.2d 1204, 1213-14 (3rd Cir. 1993) (citations omitted). In the words of the implementing regulations, schools must educate disabled children in the"least restrictive environment." 34 C.F.R. s 300.550.

Second, the IDEA mandates that participating states extend to disabled children, parents, teachers, school officials, and educational institutions a host of procedural protections and administrative safeguards. 20 U.S.C. s 1415. Schools must afford parents of disabled children the opportunity to participate in educational decisions. States must establish an administrative review apparatus to resolve disputes between parents and school officials over, for example, the proper educational placement for a

disabled child. Under the IDEA, parents are entitled to notice of proposed changes in their child's educational program and, where disagreements arise, to an "impartial due process hearing." Id. s 1415(b)(2). Once the available avenues of administrative review have been exhausted, aggrieved parties to the dispute may file a civil action in state or federal court. Id. s 1415(e)(2).

The IDEA includes a "stay-put" provision, under which the disabled child "shall remain in the then current educational placement of such child" during the pendency of administrative or judicial review, unless "the State or local educational agency and the parents or guardian otherwise agree on an interim placement." Id. s 1415(e)(3). By preserving the status quo ante, the stay-put provision ensures an uninterrupted continuity of education for a disabled child pending administrative resolution. See Logsdon on Behalf of Logsdon v. Board of Educ. of Pavilion Cent. School Dist., 765 F. Supp. 66 (W.D.N.Y 1991).

[1] In Honig v. Doe, 484 U.S. 305, 108 S.Ct.592, 98 L.Ed.2d 686 (1988), the Supreme Court declined to find an

implied exception to the stay-put provision for assertedly "dangerous" children. The Court held that Congress intended "to strip schools of the unilateral authority they had traditionally employed to exclude disabled students, particularly emotionally disturbed students, from school." Id. at 323, 108 S.Ct. at 604 (emphasis in original). A school seeking to remove a dangerously disruptive child from her current educational placement can overcome the automatic stay-put injunction only by obtaining the permission of the parents or the equitable sanction of a court. Acting alone, school officials are restricted to "'normal procedures for dealing with children who are endangering themselves or others.'" such as "study carrels, timeouts, detention, or the restriction of privileges." Id. at 325, 108 S.Ct. at 605 (quoting Comment following 34 C.F.R. s 300.513 (1987)). In addition, "where a student poses an immediate threat to the safety of others, officials may temporarily suspend him or her for up to 10 school days." Id.

Emphasizing that the IDEA "does not leave educators

hamstrung," id. at 325, 108 S.Ct. at 605, the Supreme Court outlined the standard for judicial intervention when a school is confronted with a dangerous student: [S]chool officials are entitled to seek injunctive relief under s 1415 (e)(2) in appropriate cases. In any such action, s 1415 (e)(3) effectively creates a presumption in favor of the child's current educational ***1228** placement which school officials can overcome only by showing the maintaining the child in his or her current placement is substantially likely to result in injury either to himself or herself, or to others. Id. at 328, 108 S.Ct. at 606.

[2][3] This test looks only to the objective likelihood of injury. We reject as tautological the contention of Lauren's parents that a disabled child must be shown to be "truly dangerous" as well as substantially likely to cause injury. Their argument derives from a misreading of Honig and warrants no extensive rebuttal. More importantly, we reject their suggestion that schools can only remove children who intend to cause injury. The Lights argue that a mentally disabled child cannot be a "dangerous" child within

the meaning of Honig when that child's disability renders her unable to intend the injuries she inflicts. A child's capacity for harmful intent plays no role in this analysis. Even a child whose behaviors flow directly and demonstrably from her disability is subject to removal where that child poses a substantial risk of injury to herself or others. We note that in the case of dangerous disabled children the purpose of removal is not punishment, but "maintaining a safe learning environment for all . . . students." Id. Moreover, the removal of a dangerous disabled child from her current placement alters, but does not terminate, her education under the IDEA.

[4][5] In addition to this threshold standard, we hold today that there is an essential second test which must be met by a school district seeking judicial sanction for the removal of a dangerous disabled child: The school district must show that it has made reasonable efforts to accommodate the child's disabilities so as to minimize the likelihood that the child will injure herself or others. This second inquiry is necessary to ensure that the school

district fulfills its responsibility under the IDEA to make available a "free appropriate public education . . . for all handicapped children . . .." 20 U.S.C. s 1412(2)(B). While we do not intend to expand district court removal hearings into wide-ranging assessments of entire educational programs, we believe that school districts should not seek to remove disabled children until reasonable steps have been taken to mitigate the threat of injury. The scope of this inquiry is indicated by 20 U.S.C. s 1412 (5)(B), which requires that the "removal of handicapped children from the regular education environment occurs only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily . . .." Before exercising its equitable authority to remove a disabled child from any placement, a district court should be satisfied that the school district has made reasonable use of "supplementary aids and services" to control the child's propensity to inflict injury.

[6][7] In sum, a school district seeking to remove an

assertedly dangerous disabled child from her current educational placement must show (1) that maintaining the child in that placement is substantially likely to result in injury either to himself or herself, or to others, and (2) that the school district has done all that it reasonably can to reduce the risk that the child will cause injury. Where injury remains substantially likely to result despite the reasonable efforts of the school district to accommodate the child's disabilities, the district court may issue an injunction ordering that the child's placement be changed pending the outcome of the administrative review process.

IV. IS LAUREN'S PLACEMENT AT PARKWAY CENTRAL MIDDLE SCHOOL SUBSTANTIALLY LIKELY TO RESULT IN INJURY?

[8] For reasons outlined above, we conclude that the district court properly understood the first prong of our two-part test. Reviewing the evidence of Lauren's disruptive behavior at Parkway Central Middle School, the district court expressed its conviction "that should this behavior continue in the Parkway

[Central] Middle School, Lauren will either injure herself or another" and found that "maintaining Lauren Light in her current educational placement is substantially likely to result in injury either to herself or to others."

***1229** These conclusions constitute findings of fact, which we must uphold unless clearly erroneous. Craft v. Metromedia, Inc., 766 F.2d 1205, 1212 (8th Cir. 1985), cert. denied, 475 U.S. 1058, 106 S.Ct. 1285, 89 L.Ed.2d 592 (1986). "[W]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." Anderson v. City of Bessemer City, 470 U.S. 564, 574, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985). Deference is due "even when the district court's findings do not rest on credibility determinations, but are based instead on physical or documentary evidence or inferences from other facts." Id.

The record amply supports the district court's findings. The record exhaustively documents Lauren's almost daily episodes of aggressive behavior at Parkway Central Middle School. The

undisputed testimony of several witnesses reveals that Lauren kicked, hit, and bit her teacher, Jane Galownia, at least several times a week. At various times, Lauren has hit, kicked, and slapped other disabled and non-disabled students; thrown pencils and other objects at other students' eyes, ears and faces; and attempted to overturn desks and tables. As noted above, Lauren's daily log has recorded a mean incidence of fifteen aggressive acts per week. Dr. Joseph Jones, the Director of Special Education for Lauren's region, testified that Lauren's aggressive behavior varies cyclically and might generate anywhere from zero to fifteen incidents on a given day.

The following undisputed incidents are illustrative of Lauren's capacity to inflict injury. On January 12, 1994, Lauren poked another student in the stomach with a pencil, slapped Galownia, slapped another student, and hit Galownia in the fact with her head. On January 13, 1994, Lauren slapped Galownia twice. On January 31, 1994, Lauren grabbed Galownia's hand and bit down hard on her thumb for about fifteen seconds. Lauren

released the thumb upon the intervention of Mary Granville, the specialist and consultant, who happened to be present that day for observation. On both February 1 and 2, 1994, when Galownia was assisting with the use of a sewing machine, Lauren bit her teacher's arm. On February 3, 1994, Lauren hit Galownia and threw a crayon at another student, striking him in the face.

On March 3, 1994, Lauren bruised a nondisabled student by slapping his face as she ran from the gym, and later bit Galownia on the hand. On March 18, 1994, while on a community access trip, Lauren dashed into the street at an intersection. After Galownia intervened to retrieve her, Lauren kicked Galownia and hit Suzanne Seibel. When they rejoined the group, Lauren kicked another student. On March 24, 1994, Lauren bit Galownia on the neck while giving her a hug. On April 12, 1994, Lauren grabbed the hand of another disabled student and struck him three times on the forehead and head, raising her hand back to her head with each blow. Later that day at the suspension hearing, Lauren kicked Galownia several times.

Our account of these behaviors is neither detailed nor complete, but serves only to illuminate our holding that the district court's findings are not clearly erroneous.

In addition, the district court heard testimony that Lauren had occasionally engaged in behaviors which threatened injury to herself. Lauren frequently placed objects in her mouth, including toxic markers. Dr. Toni Strieker, the Area Coordinator for the SSD, testified that other students at Parkway were aware of Lauren's pattern of physical aggression and were likely to strike back at her to defend themselves when attacked. Dr. Joseph Jones, the Director of Special Education for Region V in the SSD, testified that other students displayed increasing anxiety and fear around Lauren due to the cumulative effect of her behaviors and to the students' awareness of the inability of the teaching staff to protect them entirely.

The record contains little evidence that Lauren's aggressive behaviors have decreased in frequency or severity since her arrival at Parkway Central Middle School. Dr. Jones testified

that Lauren's behavior had not changed over the previous two years.

[9] The Lights argue that the district court's findings are clearly erroneous because Lauren's behaviors amounted to no more than a nuisance. The Lights stress that Lauren only once punctured Galownia's ***1230** skin, that no medical treatment by a physician has been required, and that the police have never been called to restrain Lauren. In general, the Lights claim that the district court failed to employ an adequately specific and stringent definition of "injury." We disagree. As an initial matter, we emphatically reject the contention that an "injury" is inflicted only when blood is drawn or the emergency room visited. Bruises, bite marks, and poked eyes all constitute "injuries" in the context of this analysis. More broadly, we reject the proposition that a child must first inflict serious harm before that child can be deemed substantially likely to cause injury.

We affirm the district court's use of the Honig test and find no clear error in its findings of fact.

V. HAVE THE SCHOOL DISTRICTS TAKEN REASONABLE STEPS TO MINIMIZE LAUREN'S RISK OF CAUSING INJURY?

[10] We find that the district court erred in its refusal to ascertain whether Parkway School District and the SSD have made reasonable efforts to accommodate Lauren's disabilities. As already noted, this inquiry should not be a wide-ranging review of all aspects of a student's educational program, but should focus on whether the school district has done all it reasonably can to minimize the risk of resulting injury through the use of "supplementary aids and services." See 20 U.S.C. s 1412(5)(B). Based upon our independent review of the record, we conclude that the school districts have taken reasonable steps to minimize Lauren's propensity to cause injury. A fuller discussion of the school districts' efforts is contained in the factual summary above, and we need not repeat it here.

The Lights contend that Lauren would be less likely to cause injury if her teachers were better trained. They rely on the

testimony of Mary Granville, the consultant retained by the SSD to facilitate Lauren's transition to Parkway Central Middle School. Granville testified that she "would expect" more training to result in "fewer . . . incidents of biting and kicking . . .." Tr. 2147-48. Granville's testimony was contradicted by several witnesses, including Dr. Toni Streiker, the Area Coordinator for the SSD. Streiker gave her professional opinion that the assistance of inclusion facilitators, behavior management specialists, special education consultants, and crisis prevention trainers had produced no reduction in the frequency of Lauren's aggressive behaviors. We note that extensive training and support have already been provided. Lauren's teacher, Jane Galownia, and teacher's assistant, Lynn Wilson, have been appropriately certified by the State of Missouri. In addition, Galownia received specific training from Mary Granville at the beginning of the school year and consulted with her from time to time during the ensuing months. All of the teachers and staff in Lauren's classroom received training in crisis prevention and intervention, in behavior

management strategies, and in inclusion practices. The SSD also provided periodic assistance from its staff of inclusion facilitators.

Based upon these uncontradicted facts, we conclude that the school districts took reasonable steps to train and prepare Lauren's teaching staff. The Lights have put forward no other alternative measures that they believe the school districts should reasonably be required to attempt.

In short, the school district has met its burden under both prongs of the two-part test we adopt today. The district court committed no clear error in finding that Lauren Light's placement at Parkway Central Middle School was substantially likely to result in injury, either to herself or to others. Moreover, we conclude that Parkway School District and the SSD made reasonable efforts to minimize the risk that Lauren would inflict injury. Thus, we hold that Lauren Light was properly removed by the district court from Parkway Central Middle School.

VI. LAUREN'S INTERIM PLACEMENT

[11] Finally, we are confronted with the issue of the

proper interim placement for Lauren pending the resolution of the Lights' administrative challenge to the new long-term educational placement proposed by Lauren's IEP team. The parties apparently disagree about whether Lauren should be ***1231** temporarily placed at the Neuwoehner School, a segregated facility for disabled children, or in a self-contained classroom for children with autism at the Brittany Woods School in a neighboring school district. Given the temporary nature of the interim placement and the safety concerns which motivate the removal, we believe that due deference should be accorded to the determination of the school district. We emphasize that the interim placement should be maintained only until Lauren's long-term placement is finalized through the IDEA's administrative review process. See. 20 U.S.C. s 1415.

VII. CONCLUSION

We uphold the district court's finding that maintaining Lauren Light at Parkway Central Middle School is substantially likely to result in injury, either to Lauren or to others. Based

upon our independent review of the record, we further find that Parkway School District and the SSD have made reasonable efforts, through the use of supplementary aids and services, to minimize the risk that Lauren will inflict injury at her current placement. We affirm the order of the district court that Lauren Light be removed from Parkway Central Middle School until such time as her long-term educational placement has been decided through the appropriate administrative channels.

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

NO. 94-2333EMSL	*	
	*	
Martin Light, et al.,	*	
	*	
Appellants,	*	
	*	Order denying Petition
v.	*	for Rehearing and
	*	Suggestion for Rehearing
Parkway C-2 School District, et al.,	*	En Banc
	*	
	*	
Appellees.	*	

The suggestion for rehearing en banc is denied. The petition for rehearing by the panel is also denied.

January 11, 1995

Order Entered at the Direction of the Court:
Clerk, U.S. Court of Appeals, Eighth Circuit

Supreme Court, U.S.
FILED
MAY 15 1995
CLERK

No. 94-1797

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1994

Martin Light; Diane Light; and Lauren Light, a minor by and through Martin and Diane Light, her next friends,

Petitioners,

v.

Parkway C-2 School District; and Special School District of St. Louis County,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

**BRIEF IN OPPOSITION TO
PETITION FOR WRIT OF Certiorari**

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Questions Presented for Review

I

Whether the United States Court of Appeals for the Eighth Circuit correctly applied the standard announced by this Court in **Honig v. Doe**, 484 U.S. 305 (1988), in finding that a student who, at various times, has hit, kicked, and slapped other students, thrown pencils and other objects at other students' eyes, ears, and faces, and attempted to overturn desks and tables, is a student who is substantially likely to cause injury either to herself or to others.

II

Whether the United States Court of Appeals for the Eighth Circuit correctly interpreted the decision of this Court in **Honig v. Doe**, 484 U.S. 305 (1988), in applying the standard announced in **Honig** in a carefully reasoned opinion.

III

Whether the United States Court of Appeals for the Eighth Circuit acted in a judicially prudent manner in reaching its decision without discussing one of the points raised by the Petitioners herein, which went to the exercise of the discretion of the district court in denying Petitioners' eleventh hour request to reopen the hearing, after Petitioners had closed their case.

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II. Whether the United States Court of Appeals for the Eighth Circuit correctly interpreted the decision of this Court in **Honig v. Doe**, 484 U.S. 305 (1988), in applying the standard announced in **Honig** in a carefully reasoned opinion.

III. Whether the United States Court of Appeals for the Eighth Circuit acted in a judicially prudent manner in reaching its decision without discussing one of the points raised by the Petitioners herein, which went to the exercise of the discretion of the district court in denying Petitioners' eleventh hour request to reopen the hearing, after Petitioners had closed their case.

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Opinions Below

Respondents accept the Opinions Below as set forth in Petitioners' Petition for Writ of Certiorari.

Jurisdictional Statement

Respondents accept the Jurisdictional Statement as set forth in Petitioners' Petition for Writ of Certiorari.

Constitutional Provisions and Statutes Involved

Respondents accept the Constitutional Provisions and Statutes Involved as set forth in Petitioners' Petition for Writ of Certiorari, as supplemented herein.

20 U.S.C. § 1401(a)(18).

(a) As used in this chapter —

(18) The term "free appropriate public education" means special education and related services that —

(A) have been provided at public expense, under public supervision, and without charge,

(B) meet the standards of the State educational agency,

(C) include an appropriate preschool, elementary, or secondary school education in the State involved, and

(D) are provided in conformity with the individualized education program required under section 1414(a)(5) of this title.

20 U.S.C. § 1412(1) and (5)(B).

In order to qualify for assistance under this subchapter in any fiscal year, a State shall demonstrate to the Secretary that the following conditions are met:

(1) The State has in effect a policy that assures all children with disabilities the right to a free appropriate public education.

* * *

(5) The State has established . . . (B) procedures to assure that to the maximum extent appropriate, children with disabilities, including children in public or private institutions or other care facilities, are educated with children who are not disabled, and that special classes, separate schooling, or other removal of children with disabilities from the

regular educational environment occurs only when the nature or severity of the disability is such that education in the regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

Statement of the Case

This case involves the application of the decision of the United States Supreme Court in **Honig v. Doe**, 484 U.S. 305 (1988), to a situation involving Lauren Light. At the time of the hearing before the United States District Court for the Eastern District of Missouri, Hon. George F. Gunn, Jr., Lauren was thirteen years old. Lauren is a student with disabilities, for purposes of the Individuals with Disabilities Education Act, (IDEA or the Act) 20 U.S.C. §§ 1400-85. At various times, Lauren has been diagnosed as having a behavior disorder, a conduct disorder, a pervasive developmental disorder, a language impairment, an organic brain syndrome, mild to moderate mental retardation, and certain features of autism. Distilling the various diagnoses, Lauren presents as a child who is prone to impulsive, unpredictable, and aggressive behavior. The behaviors which Lauren demonstrates include kicking, biting, hitting, throwing objects, such as pencils, and overturning furniture.

Respondents take issue with Petitioners' statement that Lauren's condition is less severe than autism. Respondents agree that Lauren does not have all of the markers which would result in a diagnosis of autism. However, Lauren possesses other markers, not necessarily associated with autism. Moreover, autism, itself, suggests varying degrees of disability, ranging from mildly autistic to severely autistic.

Respondents also take issue with Petitioners' position that Lauren does not have a conduct disorder. Petitioners rely on the testimony of Dr. Audrey Hill. Respondents note that Dr. Hill, a resident child psychiatrist at St. Louis University Health Sciences Center at the time of the hearing, had never conducted a complete reevaluation of Lauren, nor had Dr. Hill removed the conduct disorder

diagnosis after treating her. Dr. Hill first announced her questioning of the conduct disorder diagnosis at the hearing before the district court.

Rather than quibble over definitions and labels, however, Respondents will confine themselves to a discussion of behaviors in which Lauren was observed to engage while in the school setting.

As the Eighth Circuit noted in its December 2, 1994, decision, the parents, themselves, describe Lauren as "sometimes defiant, easily frustrated, irritable, impulsive, and easily distracted." **Light v. Parkway C-2 School Dist.**, 41 F.3d 1223, 1225 (8th Cir. 1994)(quoting Plaintiffs' Motion for Temporary Restraining Order at 2). The parents went on to state that Lauren "sometimes exhibits aggressive behaviors such as kicking, biting, hitting and throwing objects." **Id.**

Throughout much of her educational career, Lauren was educated in schools operated by the Special School District of St. Louis County, (SSD), schools devoted to the education of students with multiple disabilities or severe disabilities, with educational programs designed to meet the educational needs of such students. Prior to the beginning of the 1992-93 school year, Lauren's parents expressed a desire that Lauren be educated in a school operated by the Parkway C-2 School District (Parkway). If Lauren were not disabled, she would have attended a Parkway school. An individualized education program (IEP) was written for Lauren, which incorporated a number of accommodations intended to allow Lauren to be educated satisfactorily in a Parkway school, specifically, at Riverbend Elementary School. Lauren spent the 1992-93 school year enrolled in a self-contained classroom, for students with mental disabilities at Riverbend, operated by the SSD.

At the end of the 1992-93 school year, it was decided that Lauren would move up to Parkway Central Middle School for the 1993-94 school year. There, she would be among age-equivalent peers. In order to facilitate a successful stay at Parkway Central Middle School for Lauren, the SSD incorporated a number of accommodations into Lauren's IEP for the 1993-94 school year. Lauren's IEP required that Lauren be accompanied by and taught by a teacher and an aide, specifically assigned to her. As the Eighth Circuit noted: "Thus, in addition to the classroom teacher assigned to her room, Lauren was accompanied by one full-time teacher, Jane Galownia, and one full-time teacher's assistant, Lynn Wilson, throughout the school day. Both Galownia and Wilson have been certified by the State of Missouri to teach students with mental handicaps, behavioral disorders, and learning disabilities." **Id.** In addition, a classroom aide was assigned to the classroom where Lauren received the majority of her education.

That was not all that the SSD and Parkway did for Lauren during the 1993-94 school year:

> [T]he SSD provided special training to members of the staff who regularly came into contact with Lauren, including training in behavior management, inclusion, and crisis intervention. To ease the transition from Riverbend, the SSD agreed to retain the services of a consultant selected by the Lights, Mary Granville of the Judevine Center for Autistic Children. Granville had worked with Lauren at Riverbend to facilitate her inclusion in the regular school environment, and performed a similar role in planning for and assisting with Lauren's transition to Parkway Central Middle School. Lauren's curriculum included speech therapy,

occupational therapy, physical therapy, instruction in daily living skills, adapted physical education, functional academics, and weekly community access opportunities. Lauren's teachers kept daily logs of her activities and behavior and provided daily reports to her parents. Outside of the special education classroom, Lauren was enrolled in several courses in the regular classroom setting with her nondisabled peers, including physical education, art, computer lab, home economics, and library. The SSD provided staff support for Lauren to participate in after-school activities. In September of 1993, the SSD agreed to a request by Lauren's parents that she be provided music therapy twice a week. When Lauren's music therapist became ill, the SSD hired a replacement and increased the frequency of the lessons to three a week to make up for lost instructional time. No other SSD student was provided with music therapy.

Id.

Despite the intensive interventions built into Lauren's IEP, she nevertheless exhibited numerous and frequent aggressive and disruptive behaviors. Many of the aggressive acts resulted in the recipient of the aggression having to see the school nurse. At one point, Lauren bit Galownia, clamping down and refusing to let loose, until Mary Granville, who was present, intervened. Lauren averaged three aggressive acts per day. Lauren's behaviors were disruptive and deleterious to the educational process of the other students.

Faced with the numerous and frequent aggressive and disruptive behaviors, Parkway and the SSD looked to determine whether Lauren's continued placement at

Parkway Central Middle School was appropriate for her. Lauren's IEP was revised. A reevaluation of Lauren was commenced. In March, 1994, the IEP team, which included Lauren's parents and their attorney, met yet again. The IEP/placement process prescribed by the IDEA was not completed after a full-day meeting. A second meeting would be necessary. However, during the March meeting, it was proposed by the districts that Lauren be removed from the regular education art class. The Lights disagreed and requested an administrative hearing, as contemplated by the IDEA, thereby invoking the "stay-put" provision found in 20 U.S.C. § 1415(e).

The IEP team reconvened on April 6, 1994. At that time, the SSD and Parkway proposed a change in educational placement. The parents disagreed with the proposed change of placement and again exercised their rights under the IDEA. Significantly, the witnesses to whom Petitioners refer in Part III of their Argument were present during this IEP team meeting. Petitioners were well aware of their identity at the time of the hearing before the district court. Petitioners had the power of subpoena available to them during the hearing before the district court. Petitioners shows not to subpoena the witnesses.

Six days later, on April 12, 1994, while Lauren was in art class, she grabbed the hand of another student with disabilities and struck the student at least three times. Following Lauren's overtly aggressive act, Parkway imposed a ten-day suspension. Before imposing the ten-day suspension, Parkway, through an assistant principal with extensive special education background herself, informed Lauren of the fact that the district was intending to suspend her. Lauren indicated that she was aware that she had struck the other student. Also present at the meeting were Lauren's teacher and the teacher's

immediate supervisor — a former professor of special education at the University of Missouri - St. Louis. Both testified that Lauren reacted in such a way that she knew that she was in trouble.

Mrs. Light had been invited, by telephone, to the office prior to the principal's meeting with Lauren. However, she declined. Later, the assistant principal informed Mrs. Light of the conduct in which Lauren had engaged. That evening, Parkway provided the parents with a written notice of the suspension and extended an invitation to the parents to discuss the matter more fully.

Instead, the parents chose to file an action in federal court, seeking both a declaratory judgment that Lauren had not been accorded adequate due process before the suspension was imposed, and injunctive relief, requiring the districts to allow Lauren to return to school. The districts filed a counterclaim, asking the district court, pursuant to **Honig v. Doe**, to allow the districts to change Lauren's educational placement during the pendency of the special education due process procedures.

After less than a day of testimony, the district court, in a ruling from the bench, ordered the districts to allow Lauren to return to Parkway Central Middle School. However, after two additional days of testimony, the district court vacated its previous order, and granted the districts' motion for injunctive relief, allowing the districts to change Lauren's educational placement. In so doing, the district court found that "maintaining Lauren in her current placement is substantially likely to result in injury either to herself or to others." **Light v. Parkway C-2 School Dist.**, 41 F.3d at 1226 (quoting the Order entered by the district court at App. 1).

The parents appealed to the United States Court of Appeals for the Eighth Circuit. The Eighth Circuit agreed that maintaining Lauren in her current placement was substantially likely to result in injury either to herself or to others. **Id.** at 1230. On appeal, the parents had argued that in order for a court to order a change in placement under **Honig v. Doe**, the court must first find that the student is a truly dangerous child. To do so, the parents argued, the court would have to find that the student was capable of intending and in fact did intend to cause injury. Moreover, the injury involved, the parents argued, must be one involving the intentional infliction of serious harm. The Eighth Circuit rejected the parents' argument. The Eighth Circuit reaffirmed this Court's ruling in **Honig v. Doe:** that a school district seeking to change the educational placement of a student by invoking the equitable powers of the court must show that maintaining that student in the current placement is substantially likely to result in injury, either to the student or to others.

In a natural application of equity principles, the Eighth Circuit also announced that a school district, in seeking injunctive relief as anticipated by **Honig v. Doe**, must demonstrate that it took reasonable steps to minimize the risk of causing injury. Although the district court had not issued a ruling on this second prong, the Eighth Circuit, upon a review of the record, concluded that Parkway and the SSD had made reasonable efforts to minimize the risk that Lauren would inflict injury. **Light v. Parkway C-2 School Dist.**, 41 F.3d at 1230.

This case does not present a situation in which a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter. As Petitioners, themselves, state: "Until now, no circuit court has interpreted the standard found in this Court's decision in **Honig v. Doe**,

484 U.S. 305 (1988)." Petitioners' Petition for Writ of Certiorari at 11.

Similarly, this case does not present a situation in which a United States court of appeals has decided a federal question in a way that is in conflict with a state court of last resort.

Moreover, this case does not present a situation in which a United States court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

For the reasons advanced below, Respondents submit that this Court should deny the Petition for Writ of Certiorari.

Argument

I

Whether the United States Court of Appeals for the Eighth Circuit correctly applied the standard announced by this Court in Honig v. Doe, 484 U.S. 305 (1988), in finding that a student who, at various times, has hit, kicked, and slapped other students, thrown pencils and other objects at other students' eyes, ears, and faces, and attempted to overturn desks and tables, is a student who is substantially likely to cause injury either to herself or to others.

This case involves the application of the decision of the United States Supreme Court in **Honig v. Doe**, 484 U.S. 305 (1988), to a situation involving Lauren Light, a student with disabilities, as that term is used in the Individuals with Disabilities Education Act, 20 U.S.C. §§ 1400-85. In interpreting **Honig v. Doe** and applying it the facts of this case, the Eighth Circuit held:

> [A] school district seeking to remove an assertedly dangerous disabled child from her current educational placement must show (1) that maintaining the child in that placement is substantially likely to result in injury either to himself or herself, or to others, and (2) that the school district has done all that it reasonably can to reduce the risk that the child will cause injury. Where injury remains substantially likely to result despite the reasonable efforts of the school district to accommodate the child's disabilities, the district court may issue an injunction ordering that the child's placement be changed pending the outcome of the administrative review process.

Light v. Parkway C-2 School Dist., 41 F.3d 1223, 1228 (8th Cir. 1994).

The Individuals with Disabilities Education Act, guarantees all students with disabilities in participating states "the right of free appropriate public education." 20 U.S.C. § 1412(1). The term "free appropriate public education" means:

> special education and related services that (A) have been provided at public expense, under public supervision and direction, and without charge, (B) meet the standards of the state educational agency, (C) include an appropriate preschool, elementary, or secondary school education in the state involved, and (D) are provided in conformity with the individualized education program required under § 1414(a)(5) of this title.

20 U.S.C. § 1401(a)(18).

With this definition, the Act defines a free appropriate public education (FAPE) in broad, general terms, without dictating substantive educational policy or mandating specific educational methods. This imprecise nature of the IDEA's mandate reflects two important underpinnings of FAPE. First, "Congress chose to leave the selection of educational policy and methods where they have traditionally resided -- with state and local school officials." **Daniel R.R. v. State Board of Education**, 874 F.2d 1036, 1044 (5th Cir. 1989)(citing **Bd. of Educ. v. Rowley**, 458 U.S. 161, 207 (1982)). Second, Congress sought to bring children with disabilities into the mainstream of the public school system. **Mark A. v. Grant Wood Area Education Agency**, 795 F.2d 52, 54 (8th Cir. 1986); **Rowley**, 458 U.S. at 189.

In harmony with the foregoing, the IDEA assures that "to the maximum extent appropriate," children with disabilities will be educated with nonhandicapped children, 20 U.S.C. § 1412(5)(B), and mandates that "special classes in separate schools" are appropriate only when the "nature or severity of the disability is such that education in regular classes with use of supplementary aids and services can not be achieved satisfactorily." 20 U.S.C. § 1412(5)(B).

Section 20 U.S.C. § 1412(5)(B) indicates a strong congressional preference for mainstreaming. **Daniel R. R.**, 874 F.2d at 1045; **Lachman v. Illinois State Board of Education**, 852 F.2d 290, 295 (7th Cir. 1988); **A. W. v. Northwest R-I School District**, 813 F.2d 158, 162 (8th Cir. 1987); **Roncker v. Walter**, 700 F.2d 1058, 1063 (6th Cir. 1983). This provision is also referred to as the requirement of "least restrictive environment." 34 C.F.R. §§ 300.550-.556 (1986); **A. W.**, 813 F.2d at 162.

Insofar as a state is required to provide a child with disabilities a FAPE, the Supreme Court has found that a school district satisfies this requirement by providing personalized instruction with sufficient support services to permit the child to benefit educationally from that instruction. Such instruction and services must be provided at public expense, must meet the state's educational standards, must approximate the grade levels used in the state's regular education, and must comport with the child's IEP. In addition, the IEP, and therefore the personalized instruction, should be formulated in accordance with the requirements of the Act.

The IDEA requires participating states to educate children with disabilities with nondisabled children whenever possible. Before a school district may place a student in a more restrictive environment, it must

demonstrate that the nature or severity of the disability is such that education in the less restrictive environment with the use of supplementary aids and services cannot be achieved satisfactorily. 20 U.S.C. § 1412(5)(B). The school district must also make efforts to modify the regular education program to accommodate the disabled child. **Oberti v. The Board of Education**, 995 F.2d 1204 (3rd Cir. 1993).

"Congress repeatedly emphasized throughout the Act the importance and indeed the necessity of parental participation in both the development of the IEP and any subsequent assessments of its effectiveness." **Honig v. Doe**, 484 U.S. at 311. Whenever the parents or guardian of a student with disabilities disagrees with the evaluation, educational plan, or placement of the student, or disagrees that the student is receiving a FAPE, those parents or guardian has the right to seek review of those aspects of the student's education which the parents or guardian believes are inappropriate. **Id.** at 312; 20 U.S.C. § 1415. Among the rights available to the parent or guardian is the right to an "impartial due process hearing." 20 U.S.C. § 1415(b)(1), (2). If the parent or guardian disagrees with the decision at the administrative level, the parent or guardian has the right to file an action in either state or federal court. 20 U.S.C. § 1415(c), (e)(2).

> During the pendency of any proceedings conducted pursuant to [§ 1415], unless the State or local educational agency and the parents or guardian otherwise agree, the child shall remain in the then current educational placement of such child. . . .

20 U.S.C. § 1415(e)(3). This provision is known as the "stay-put" provision.

What happens if allowing a student to remain in the then current educational placement would pose a significant risk of injury, either to the student or to others? In **Honig**, this Court found that there is no "dangerousness" exception to the stay-put provision. **Honig v. Doe**, 484 U.S. at 323. However the Court went on to state:

> As the [IDEA]'s legislative history makes clear, one of the evils Congress sought to remedy was the unilateral exclusion of disabled children by *schools*, not courts, and one of the purposes of § 1415(e)(3), therefore, was "to prevent *school* officials from removing a child from the regular public school classroom over the parents objection pending completion of the review proceedings."

Honig v. Doe, 484 U.S. at 327 (quoting **Burlington School Committee v. Massachusetts Dept. of Education**, 471 U.S. 359, 373)(emphasis by the **Honig** court).

Therefore, where a school district is faced with a situation in which maintaining a student in that student's current educational placement would pose a significant risk of injury either to the student or to others, and the school district is unable to otherwise agree with the parent with respect to an interim placement, then that school district may seek injunctive relief under § 1415(e)(2). That is precisely what Parkway and the SSD did in this case.

When seeking injunctive relief, a school district must overcome the presumption noted above in favor of the then current educational placement. **Honig v. Doe**, 484 U.S. at 328. To do so, a school district must show that maintaining the student in his or her then current educational placement is "substantially likely to result in injury either to himself or herself, or to others." **Id.**

Petitioners ask this Court to hold that a school district must demonstrate that the student is "truly dangerous," in addition to substantially likely to cause injury. The Eighth Circuit appropriately dismissed this argument as tautological. Such a requirement would render this Court's decision in **Honig** superfluous.

In addition, Petitioners would have this Court find that a child cannot be truly dangerous if the child were incapable of forming the intent to injure. The Eighth Circuit, quite understandably, gave this argument short shrift.

The Eighth Circuit did announce what it purported to be an "essential second test" which must be met by a school district. That is, the "school district must show that it has made reasonable efforts to accommodate the child's disabilities so as to minimize the likelihood that the child will injure herself or others." **Parkway v. Light**, 41 F.3d at 1228.

The essential second test is a logical application of well founded principles of equity. It is tantamount to an "educational clean hands" doctrine.

Thus, in reaching its decision, the Eighth Circuit appropriately applied the standard set by this Court in **Honig v. Doe**. Accordingly, this Court should not grant Petitioners' Petition for Writ of Certiorari.

II

Whether the United States Court of Appeals for the Eighth Circuit correctly interpreted the decision of this Court in Honig v. Doe, 484 U.S. 305 (1988), in applying the standard announced in Honig in a carefully reasoned opinion.

Petitioners propose an eight-part test for determining whether or not an action is dangerous. Petitioners miss the point. This Court announced that the measure for whether or not a school district is entitled to injunctive relief is whether maintaining the student in his or her then current educational placement is likely to result in injury, either to the student or to others.

Apparently, Petitioners believe that because police were not called and because no one lost life or limb, there was no injury, simply nuisance. It does not matter to Petitioners that Lauren would bite her teacher on a daily basis. It does not matter to Petitioners that Lauren would kick her classmates. It does not matter to Petitioners that Lauren struck a classmate in the art room time after time after time.

As used in the **Honig** test, "injury" need not be a physical injury that would require medical attention. The Eighth Circuit is absolutely correct in rejecting the contention of Petitioners that "an 'injury' is inflicted only when blood is drawn or the emergency room visited." **Light v. Parkway C-2 School District**, 41 F.3d at 1230.

Indeed, as the Eighth Circuit points out, what a school district must show is the ***likelihood*** of injury, not that serious harm has already been inflicted. Moreover, the Respondents suggest that psychological injury, emotional

injury, and educational injury are equally damaging to a young student.

The Eighth Circuit's decision is thoughtful and carefully measured. It correctly interprets and applies **Honig v. Doe**. It does not expand into new areas. Rather, it draws upon time honored equitable doctrine and a decision of this Court. Accordingly, this Court should not grant Petitioners' Petition for Writ of Certiorari.

III

Whether the United States Court of Appeals for the Eighth Circuit acted in a judicially prudent manner in reaching its decision without discussing one of the points raised by the Petitioners herein, which went to the exercise of the discretion of the district court in denying Petitioners' eleventh hour request to reopen the hearing, after Petitioners had closed their case.

The standard to apply in reviewing a district court's refusal to reopen a case is abuse of discretion. **Johnson v. Busby,** 953 F.2d 349, 351 (8th Cir. 1991); **Harris v. Ark. Dept. of Human Services,** 771 F.2d 414, 416 (8th Cir. 1985) (lower court will not be reversed in absence of a "clear showing of abuse of discretion"). Under Federal Rule of Civil Procedure 59, the district court has broad discretion in deciding whether to reopen a case. In making this decision, the court should take into account "the character of the additional testimony and the effect of granting the motion. . . . The court should also consider the diligence of the moving party, and any possible prejudice to the other party." **SEC v. Rogers,** 790 F.2d 1450, 1460 (9th Cir. 1986). In the instant case, the district court did not abuse its discretion in refusing to reopen the hearing.

As a threshold matter, Petitioners never formally moved to reopen the hearing. After resting their case on April 21, 1994, Petitioners merely wrote to Judge Gunn on April 22, 1994, asking to have the hearing reopened, knowing full well that the court intended to enter judgment on that same date. Informal correspondence, such as that presented by Petitioners is not sufficient to serve as a formal motion. **See Cochran v. Celotex Corp.**, 125 F.R.D. 472, 473-74 (C.D. Ill. 1989) ("it is improper to communicate with any court by means of correspondence -- the appropriate method of communicating with a court is by means of a motion"). Moreover, the letter was not sent to the clerk of the court, but to Judge Gunn's chambers, so presumably, Petitioners did not intend for it to become part of the record. It is clear that the letter was simply intended to circumvent well-established rules and to gain an advantage when it appeared the court would rule in the districts' favor.

Moreover, there was nothing of substance in the letter to Judge Gunn to support the allegations of "extraordinary new evidence." The basis for the request was founded on hearsay, the reporter of which was Mrs. Light.

In addition, the court's refusal to reopen the hearing was not an abuse of discretion because Petitioners did not act with diligence in securing their witnesses. Petitioners letter fails to explain why they could not have spoken to and obtained these "new" witnesses at an earlier date. Each of the witnesses mentioned in the letter was present at both the March 23 and April 6 IEP meetings and each had the opportunity to state her views. In fact, Petitioners asked questions of each of these individuals during the two IEP meetings. Although the hearing moved quickly, it is clear that Petitioners did not act with diligence in securing and subpoenaing witnesses they knew were available to testify.

Refusing to reopen the case did not leave the Petitioners hamstrung. The ultimate placement issue, at the time of the district court's order, was still to be decided under the IDEA's administrative procedures.

In summary, it is clear that the district court did not abuse its discretion in refusing to reopen the hearing. The additional testimony was irrelevant and Petitioners were simply not diligent in securing their witnesses. Finally, the districts would clearly have been prejudiced by any further delay in receiving the requested injunctive relief because each additional day that Lauren remained at the Middle School presented an opportunity for a student or staff member to be harmed.

Conclusion

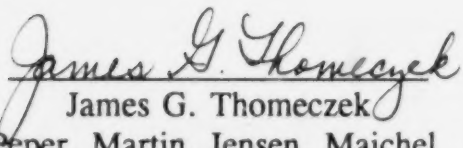
This case does not present a situation in which a United States court of appeals has rendered a decision in conflict with the decision of another United States court of appeals on the same matter. Nor is this case one in which a United States court of appeals has decided a federal question in a way that is in conflict with a state court of last resort. Moreover, this is not one in which a United States court of appeals has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Supreme Court's power of supervision.

This case simply presents a situation in which the United States Court of Appeals for the Eighth Circuit examined, explained, and applied this Court's decision in **Honig v. Doe**. The Eighth Circuit reaffirmed this Court's opinion that there may be times when a school district will have to invoke the equitable jurisdiction of the courts to change the educational placement of a student with

disabilities, whose continued presence in the current placement presents a substantial likelihood of injury.

Because such is an appropriate exercise of the court's equitable powers, and because the court, in this case, wisely and carefully exercised its discretion in changing Lauren's placement , Petitioners' Petition for Writ of Certiorari should be denied.

Respectfully submitted,



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